

NO. 80395-1

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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CITY OF ARLINGTON, DWAYNE LANE,  
and SNOHOMISH COUNTY,

Appellants,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS  
BOARD, STATE OF WASHINGTON; 1000 FRIENDS OF  
WASHINGTON nka FUTUREWISE; STILLAGUAMISH FLOOD  
CONTROL DISTRICT; PILCHUCK AUDUBON SOCIETY; THE  
DIRECTOR OF THE STATE OF WASHINGTON DEPARTMENT OF  
COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT; and  
AGRICULTURE FOR TOMORROW,

Respondents.

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*Petitioner*  
**SUPPLEMENTAL BRIEF OF ~~RESPONDENT~~ DIRECTOR OF THE  
STATE OF WASHINGTON DEPARTMENT OF COMMUNITY,  
TRADE AND ECONOMIC DEVELOPMENT**

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## I. INTRODUCTION

The Growth Management Act (GMA) requires that agricultural lands of long-term commercial significance be designated and conserved, and it sets specific criteria to be used by counties in determining which lands should be so designated. The GMA also requires that counties establish urban growth areas (UGAs), outside of which growth can occur only if it is not urban in nature, and the GMA imposes specific limits on the permissible size and location of UGAs.

Snohomish County adopted two ordinances that removed the agricultural designation from lands in the "Island Crossing area," expanded the Arlington UGA to include Island Crossing, and re-designated Island Crossing for urban commercial development. On review, the Growth Management Hearings Board determined the ordinances were clearly erroneous and did not comply with the GMA's goals and requirements.

The County's decision to de-designate agricultural lands in Island Crossing rested on the County's finding, justified by citations to selected portions of the record, that Island Crossing no longer has long-term commercial significance for agriculture. On review, the Board reviewed *all* the evidence assembled by the County and concluded the County's finding was contrary to the weight of the evidence in the entire record.

The Court of Appeals reversed. It held, first, that the Board improperly “dismissed” the evidence the County had cited as justification for its decision and, second, that, because there was some evidence in the record supporting the County’s finding, the Board erred in not deferring to the County’s decision. Appendix at 13, ¶ 22; 16, ¶¶ 27-28.<sup>1</sup>

The Court’s characterization of the Board as having “dismissed” evidence does not fairly reflect the Board’s decision. In fact, the Board weighed the evidence and found the weight of the evidence contradicted the County’s finding. More significantly, the Court of Appeals misapplied the standard of judicial review, under the Administrative Procedure Act (APA), that examines whether substantial evidence supports the Board’s decision. As discussed below, the GMA requires the Board to consider and weigh evidence, and to examine the County’s action in light of the entire evidence in the record for compliance with the applicable goals and requirements in the GMA. Here, the record includes substantial evidence supporting the Board’s decision that the County’s re-designation of agricultural lands in Island Crossing did not comply with the GMA’s goals and requirements for designating agricultural lands and was clearly erroneous given the record as a whole.

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<sup>1</sup> A copy of the Court of Appeals decision is included in the attached Appendix at 6-20.

The Board also concluded the County had impermissibly expanded the Arlington UGA to include lands that are neither characterized by urban development nor adjacent to lands characterized by urban development, contrary to express statutory limitations in RCW 36.70A.110(1).<sup>2</sup> The Court of Appeals reversed on this issue, holding the Board incorrectly interpreted and applied the statutory term “adjacent.” Appendix at 16-17, ¶¶ 29-35.

As discussed below, the Board properly interpreted the statute, in light of the GMA’s purpose and goals, to require something more than simple “touching,” as in the UGA expansion here, where the County extended a “tail on a kite” some 700 feet along Interstate 5 solely so the Island Crossing area could “touch” the existing Arlington UGA.<sup>3</sup> The Board’s decision that the UGA expansion was clear error is based on a sound interpretation of the law as applied to the facts in the record.

## II. ISSUES PRESENTED

CTED’s petition presents four issues for review by this Court. The first two issues arise from the Court of Appeals’ reversal of the Board’s

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<sup>2</sup> The text of all relevant statutes is provided in the attached Appendix at 95-112, pursuant to RAP 10.3(a)(8), 10.4(c), and 13.7(e)(1).

<sup>3</sup> As shown by the maps and aerial photographs in the attached Appendix at 1-5, the expanded UGA is fairly described as a “kite on a string.” The Island Crossing triangle is the “kite” and the artificially-drawn connection between Island Crossing and the existing Arlington UGA is the “string.”

ruling that the County clearly erred by re-designating Island Crossing's agricultural lands for urban commercial development:

(1) Did the Court of Appeals err by failing to apply the substantial evidence test in reviewing the Board's decisions, as required under the Administrative Procedure Act (RCW 34.05) and this Court's decisions?

(2) In applying the GMA criteria that govern the designation of agricultural lands of long-term commercial significance, does substantial evidence support the Board's conclusion that the County's removal of the agricultural designation from Island Crossing was not supported by the weight of the evidence and did not comply with the GMA?

The second two issues concern the Court of Appeals' reversal of the Board's ruling that the County clearly erred by expanding the Arlington UGA to include Island Crossing:

(3) Did the Court of Appeals err by failing to give any weight to the Board's interpretation of the GMA criteria that must be satisfied before a UGA may be expanded, as required by this Court's decisions?

(4) In interpreting and applying the statutory limitations on the expansion of urban growth areas under the GMA, did the Board correctly conclude the County did not comply with the GMA by expanding the Arlington UGA to include Island Crossing?

### III. STATEMENT OF THE CASE<sup>4</sup>

"Island Crossing" is a triangular area in the Stillaguamish River floodplain north of Arlington, surrounded by agricultural lands that

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<sup>4</sup> A complete factual and procedural history of this case is at pages 3-17 in CTED's Response Brief to the Court of Appeals, filed March 31, 2007.

constitute an important center of agricultural activity in Snohomish County. CP vol. XIII, pp. 2565, 2570-71; CP vol. XV, pp. 2891, 2901-03. Except for an isolated cluster of freeway services at the north end, Island Crossing has been in agricultural use for decades and has been formally designated for agriculture since the 1970s. CP vol. XIII, p. 2565.

In 1995, however, responding to a proposal for an automobile dealership at the north end of Island Crossing, Snohomish County removed the agricultural designation, expanded the Arlington UGA to include Island Crossing, and designated the entire area for urban development. Appendix at 9-10, ¶¶ 3-7. When the Snohomish County Superior Court ruled on review that the County had violated the GMA, the County re-designated the agricultural lands in Island Crossing as agricultural land of long-term commercial significance, a designation that was affirmed in an unpublished decision of the Court of Appeals in 2001.

*Id.*

Two years later, in response to the same proponent, Snohomish County adopted Ordinance 03-063 to again remove the agricultural designation from Island Crossing, expand the Arlington UGA to include Island Crossing, and designate Island Crossing for urban commercial development. CP vol. IV, pp. 692-707. On review of multiple challenges to the County's action, the Board ruled, in a Final Decision and Order

issued March 22, 2004, that Ordinance 03-063 violated the GMA and was invalid. CP vol. XIII, pp. 2562-2602. *See* Appendix at 21-61. The Board ruled: (1) that the weight of the evidence in the record showed that Island Crossing's agricultural lands were devoted to agriculture and of long-term commercial significance, so that the County's legislative finding to the contrary was not supported by the evidence in the record; and (2) that the Island Crossing area is not already characterized by urban development or adjacent to territory already characterized by urban development, so the expansion of the Arlington UGA to include Island Crossing violated the GMA's locational requirements for UGA expansion. Appendix at 49-50, 56-57.<sup>5</sup>

The County responded by adopting Emergency Ordinance 04-057, which was substantively identical to the invalidated ordinance. CP vol. III, pp. 513-31. Following additional briefing and a compliance hearing, the Board issued an Order Finding Continuing Noncompliance on June 24, 2004, concluding Emergency Ordinance 04-057 also violated the GMA and was invalid, on essentially the same grounds as in the Final Decision and Order. CP vol. XV, pp. 2886-2918. *See* Appendix at 62-94. The Snohomish County Superior Court affirmed both decisions of the Board

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<sup>5</sup> CP vol. XIII, pp. 2590-91, 2597-98 (pp. 29-30, 36-37 as originally paginated).

on all issues. CP vol. I, pp. 96-130 (oral decision); CP vol. 1, pp. 21-25 (decision affirming Board). The Court of Appeals reversed.

#### IV. STANDARD OF REVIEW

Decisions of the Growth Management Hearings Boards are reviewed under the Administrative Procedure Act (APA), RCW 34.05.<sup>6</sup> A reviewing court applies the standards of RCW 34.05 directly to the record before the Board.<sup>7</sup> The burden of demonstrating the Board erred remains on the parties challenging the Board's decision—Snohomish County, the City of Arlington, and Dwayne Lane.<sup>8</sup>

Here, the Court of Appeals correctly cited the applicable standards of review: RCW 34.05.570(3)(d) (erroneous interpretation of law) and RCW 34.05.570(3)(e) (lack of substantial evidence). But, as shown below, the analysis in the Court of Appeals' opinion is inconsistent with these standards and demonstrates that it erroneously reversed the Board.

In challenging the evidentiary basis for a Board decision, the County and Arlington/Lane must demonstrate that the Board's order "is

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<sup>6</sup> See, e.g., *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hrgs. Bd.*, 161 Wn.2d 415, 424, ¶ 9, 166 P.3d 1198 (2007); *Lewis Cy. v. W. Wash. Growth Mgmt. Hrgs. Bd.*, 157 Wn.2d 488, 497, ¶ 7, 139 P.3d 1096 (2006).

<sup>7</sup> See *Lewis Cy.*, 157 Wn.2d at 497, ¶ 7; *Ferry Cy. v. Concerned Friends of Ferry Cy.*, 155 Wn.2d 824, 833, ¶ 17, 123 P.3d 102 (2005); *Thurston Cy. v. Cooper Point Ass'n*, 148 Wn.2d 1, 7, 57 P.3d 1156 (2002).

<sup>8</sup> RCW 34.05.570(1); *Lewis Cy.*, 157 Wn.2d at 498, ¶ 9; *Chevron, Inc. v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 156 Wn.2d 131, 136, ¶ 6, 124 P.3d 640 (2005); *Thurston Cy.*, 148 Wn.2d at 7-8.

not supported by evidence that is substantial when viewed in light of the whole record before the court.” RCW 34.05.570(3)(e).<sup>9</sup> An appellate court reviews the entire record before the Board, not just the evidence cited by the County to support its position.<sup>10</sup> Substantial evidence is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.”<sup>11</sup>

The County and Arlington/Lane also alleged, and the Court of Appeals held, that the Board “erroneously interpreted or applied the law.” RCW 34.05.570(3)(d). Under this standard, this court reviews the Board’s decision de novo, but substantial weight is afforded the Board’s interpretation of the GMA.<sup>12</sup>

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<sup>9</sup> See *Swinomish*, 161 Wn.2d at 424, ¶ 9 (substantial evidence test is used to review Board’s findings of fact); *King Cy. v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000) (same).

<sup>10</sup> See *Swinomish*, 161 Wn.2d at 423, ¶ 8; *Lewis Cy.*, 157 Wn.2d at 497, ¶ 7.

<sup>11</sup> *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrgs Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (quoting *Callegod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, review denied, 132 Wn.2d 1004 (1997)). *Accord Ferry Cy.*, 155 Wn.2d at 833 ¶ 18; *Thurston Cy.*, 148 Wn.2d at 8; *King Cy.*, 142 Wn.2d at 553.

<sup>12</sup> *Swinomish*, 161 Wn.2d at 424, ¶ 9; *Lewis Cy.*, 157 Wn.2d at 498, ¶ 9; *Thurston Cy.*, 148 Wn.2d at 14-15; *King Cy.*, 142 Wn.2d at 553; *Redmond*, 136 Wn.2d at 46.

## V. ARGUMENT

### A. Substantial Evidence Supports The Growth Management Hearings Board's Determination That Agricultural Land In Island Crossing Is Of Long-Term Commercial Significance; The Court Of Appeals Erred By Not Applying The Substantial Evidence Test In Reviewing This Evidence (Issues 1 & 2)

#### 1. GMA Standards For Agricultural Lands

The GMA requires that all counties in Washington designate agricultural lands of long-term commercial significance. *King Cy.*, 142 Wn.2d at 556 (citing RCW 36.70A.170). Counties planning under RCW 36.70A.040—including Snohomish County—also are required to adopt development regulations to conserve designated agricultural lands. *Id.* (citing RCW 36.70A.060). The comprehensive plan and implementing development regulations must continue to designate and conserve agricultural lands of long-term commercial significance, discourage incompatible uses of those lands, and include provisions that maintain and enhance the agricultural industry in the County. *Id.* at 556-57 (citing RCW 36.70A.020(8)). *See also* RCW 36.70A.070(5)(c) (rural element in comprehensive plan must protect against conflicts with the use of designated agricultural lands).

In *Lewis Cy.*, 157 Wn.2d at 502, ¶ 17, this Court identified three statutory criteria for determining which lands should be designated as agricultural lands of long-term commercial significance: (1) not already

characterized by urban growth; (2) primarily devoted to commercial agricultural production or capable of being used for such production; and (3) of long-term commercial significance for agricultural production. Even though the Board decisions challenged here were issued well before *Lewis Cy.*, the Board considered those same statutory factors in its Final Decision and Order. Appendix at 51-55.<sup>13</sup> The statutory requirements for determining whether lands should be under agricultural designation are discussed further in CTED's briefing to the Court of Appeals. *See* CTED Response Brief at 27-37.

**2. The Record Before The Board Included Substantial Evidence Showing The County Clearly Erred**

The County made a legislative finding that agricultural lands in Island Crossing were no longer of long-term commercial significance. CP vol. IV, pp. 694-694; CP vol. III, pp. 515-21. As the Court of Appeals noted, the County's finding was based primarily on a report prepared by a consultant hired by Mr. Lane (the proponent of the automobile dealership for Island Crossing, and a party in this case) and on testimony from one former landowner. Appendix at 13, ¶ 21; 15, ¶ 26.

As the Court of Appeals also noted, there was significant evidence supporting the Board's decision—i.e., supporting continued agricultural

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<sup>13</sup> CP vol. XII, pp. 2587-91 (pp. 26-30 as originally paginated).

designation for Island Crossing—including the report of the Snohomish County Planning and Development Services, the County’s Draft Supplemental Environmental Impact Statement, the United States Department of Agriculture soils report, and the recommendations and conclusions of the Snohomish County Agricultural Advisory Board. Appendix at 13-15, ¶¶ 24-25.<sup>14</sup>

The Court of Appeals inaccurately characterized the Board as having “dismiss[ed]” evidence that supported the County’s position. Appendix at 9, ¶ 1; 13, ¶ 22; 16, ¶ 27. The Board did not “dismiss” that evidence; rather, it found the evidence cited by the County to be less credible and less useful than the other evidence in the record—most of which had been generated by the County itself. The Board’s summary paragraph addressing agricultural designation issues in its Final Decision and Order shows that the Board reviewed and *weighed* all the evidence in the record. Appendix at 49-50.<sup>15</sup> In its compliance order, the Board again reviewed the record evidence and found the additional landowner testimony solicited by the County did not address whether agricultural lands in Island Crossing continued to have long-term commercial

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<sup>14</sup> To avoid duplicative briefing as to the record evidence supporting the Board’s decisions, CTED relies on the discussion of that evidence at pages 6-14 and 28-47 of the Response Brief of Futurewise, Agriculture for Tomorrow and Pilchuck Audubon Society, and in the supplemental brief filed by those parties.

<sup>15</sup> CP vol. XIII, pp. 2590-91 (pp. 29-30 as originally paginated).

importance. Appendix at 77-78.<sup>16</sup> The Board did precisely what it is required to do under RCW 36.70A.320(3): it reviewed *all* relevant evidence in the record concerning the current status of agricultural lands in Island Crossing, and it found the weight of evidence in the record did not support the County's legislative finding. See Appendix at 46-50, 76-79.<sup>17</sup>

### **3. The Court Of Appeals Misapplied The Substantial Evidence Standard**

The Court of Appeals decision misapplied the substantial evidence test when reviewing the Board's orders. In place of the well established substantial evidence test, the Court applied a test that reduces judicial review to a sort of a summary judgment standard. The Court of Appeals concluded the Board erred because the Court identified some evidence that supported the County's legislative finding. Referencing only this evidence cited by the County in support of its legislative finding, the opinion states:

“To the extent this evidence supports the County's conclusion that the land was not of long-term commercial significance to agricultural production, and we find that it does, the Board *would be required* under the GMA to defer to the County and affirm its decision redesignating the land urban commercial” . . . .

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<sup>16</sup> CP vol. XV, pp. 2901-02 (pp. 16-17 as originally paginated).

<sup>17</sup> CP vol. XIII, pp. 2587-2591 (pp. 26-30 as originally paginated in Final Decision & Order; CP vol. XV, pp. 2900-2903 (pp. 15-18 as originally paginated in Order Finding Continuing Noncompliance).

Appendix at 16, ¶ 28 (emphasis added). *See also* Appendix at 20, ¶ 47 (“Because there is evidence in the record to support the County’s conclusions, the Board should have deferred to the County” (citing RCW 36.70A.3201)).

The Court of Appeals has confounded the standard in RCW 34.05.570(3)(e) that governs judicial review of the evidence in the record, with the separate requirements RCW 36.70A.320(3) imposes on the Boards’ review of local ordinances. Under RCW 36.70A.320(3), a Board reviewing a local government’s action for compliance with the GMA “shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter.” RCW 36.70A.320(3). This statutory direction to the Board contains three distinct parts.

First, the Board has a duty to determine whether the challenged local action complies with the goals and requirements of the GMA.<sup>18</sup> This duty is repeated in RCW 36.70A.280(1), 300(3), and .330. Indeed, the Legislature established the Growth Management Hearings Boards

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<sup>18</sup> *See Swinomish*, 161 Wn.2d at 423, ¶ 8 (Board is “charged” with determining GMA compliance and, when necessary, invalidating noncompliant plans and regulations); *Lewis Cy.*, 157 Wn.2d at 498 n.7 (citing RCW 36.70A.300(3), .302(1), .320(3)); *King Cy.*, 142 Wn.2d at 552 (citing RCW 36.70A.280, .302).

specifically to hear and *determine* challenges to local governments' GMA compliance, not simply to monitor their actions. *Lewis Cy.*, 157 Wn.2d at 493 n.1.

Second, the Board has a duty to review the entire record before it—not merely to scan the record to see if any evidence supports the County. *See Swinomish*, 161 Wn.2d at 423, ¶ 8 (quoting RCW 36.70A.320(3)); *Lewis Cy.*, 157 Wn.2d at 497, ¶ 7 (same). This duty also is stated in RCW 36.70A.290(4) and is reflected in the repeated statutory requirement that the Board support its conclusions with findings based on that evidence. RCW 36.70A.270(6), .290(4), .302(1), .320(3).

Third, the Board may find noncompliance only if it finds the challenged action was clearly erroneous under the GMA. The Legislature explained in RCW 36.70A.3201 that the “clearly erroneous” standard was enacted to ensure the Boards “grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter.” Consistent with that legislative intent, this Court has explained repeatedly that deference is granted to local planning decisions only if they are consistent with the GMA’s goals and requirements.<sup>19</sup> The amount of deference the Board is to give under this standard “is neither

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<sup>19</sup> *See Swinomish*, 161 Wn.2d at 424 ¶ 8; *Lewis Cy.*, 57 Wn.2d at 498, ¶ 8 and n.7; *Quadrant Corp. v. Growth Mgmt. Hrgs. Bd.*, 154 Wn.2d 224, 238, ¶ 23, 110 P.3d 1132 (2005); *Thurston Cy.*, 148 Wn.2d at 14; *King Cy.*, 142 Wn.2d at 553.

unlimited nor does it approximate a rubber stamp”; the clearly erroneous standard “requires the Board to give the county’s actions a ‘critical review.’” *Swinomish*, 161 Wn.2d at 435 n.8.

Under the APA, a reviewing court may reverse the Board’s decision if it “is not supported by evidence that is substantial when viewed in light of the whole record before the court.” RCW 34.05.570(3)(e). Instead of examining whether substantial evidence supported the Board’s decisions, the Court of Appeals effectively held the Board *must* uphold an action of the County if the County can cite to *any* evidence in the record that supports its action—no matter the quality or quantum of that evidence, and no matter whether the weight of the evidence in the record is to the contrary. Using the Court of Appeals’ logic, a county or city could rely on a mere scintilla of evidence—or perhaps completely insubstantial evidence—and the Board would have to defer to the county or city because it cited to at least some evidence supporting its conclusion.

Neither RCW 34.05.570(3) nor any provision in the GMA authorizes a reviewing court to reverse the Board simply because some evidence supports the County’s decision. This approach ignores both the Board’s duty to weigh evidence and the Court’s duty to review whether the record as a whole provides substantial evidence to support the Board’s decision. This was legal error and should be reversed.

**B. The Growth Management Hearings Board's Interpretation Of The GMA's Requirements For Expanding Urban Growth Areas Is Consistent With Legislative Intent And Entitled To Substantial Weight (Issues 3 & 4)**

As explained more fully in CTED's response brief to the Court of Appeals, the Island Crossing area is shaped like a narrow triangle with a few freeway services at the north end alongside I-5. *See* CTED Response Br. at 42-45. The County expanded the Arlington UGA to include those services (and the site of the proposed automobile dealership) which lie some two miles north of the Arlington city limit, by including the intervening agricultural lands and 700 feet of connecting roads, giving the UGA expansion the appearance of a kite on a string. Appendix at 1-5.

The Board concluded this UGA expansion violated the locational requirements in RCW 36.70A.110(1), which permit UGA expansion only into areas "already characterized by urban growth" or "adjacent to territory already characterized by urban growth." Appendix at 50-57.<sup>20</sup> The Board's conclusion that Island Crossing is not "adjacent" to area already characterized by urban growth by virtue of a 700-foot "kite string" rested on undisputable findings that (1) the 700-foot extension is comprised entirely of freeway and roadway, (2) Island Crossing is nearly a mile from the Arlington municipal boundary, (3) the freeway services at

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<sup>20</sup> CP vol. XIII, pp. 2591-2598 (pp. 30-37 as originally paginated).

the north end of Island Crossing are nearly two miles from Arlington, and (4) Island Crossing is functionally and topographically separated from Arlington because it lies in the floodplain of the Stillaguamish River while Arlington and its UGA are located on higher land outside the floodplain. Appendix at 29-30, 50-57, 66-67, 82-83.<sup>21</sup> Based on these facts, the Board concluded that the UGA expansion was inconsistent with RCW 36.70A.110(1), both because it was not already characterized by urban development and because it was not adjacent to territory already characterized by urban development. *Id.* A brief summary of the evidence in the record relating to urban development and adjacency is at pages 42-45 in CTED's Response Brief filed in the Court of Appeals.<sup>22</sup>

The Court of Appeals reversed, again misapplying the substantial evidence test. The Court of Appeals opinion cites some facts that "at least support a conclusion" that Island Crossing is characterized by urban growth, and concludes that the Board should have deferred to the County's conclusion based on those facts. Appendix at 17, ¶ 33. As explained in

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<sup>21</sup> CP vol. XIII, pp. 2570-71, 2591-98 (pp. 9-10, 30-37 as originally paginated in Final Decision and Order); CP vol. XV, pp. 2890-91, 2906-07 (pp. 5-6, 21-22 as originally paginated in Order Finding Continuing Noncompliance).

<sup>22</sup> For example, both the 2003 DSEIS (CP vols. XI-XII, pp. 2061-2123), produced by the County to assess the proposed Arlington UGA expansion, and the subsequent Staff Report (CP vol. IX, pp. 1766-79), which recommended denial of Mr. Lane's request to expand the Arlington UGA, found no urban development in Island Crossing. The few businesses along the north edge of Island Crossing serve the rural population and travelers on I-5 and Highway 530, and the intensity of these rural/freeway businesses has not changed significantly since 1968. CP vol. XI, pp. 2131, 2183).

the previous section of this brief, this failure to apply the substantial evidence test is error.

The Court of Appeals also disregarded this Court's direction for interpretation of the GMA:

“[W]hile the Board must defer to [a city or county's] choices that are consistent with the GMA, the Board itself is entitled to deference in determining what the GMA requires. This court gives “substantial weight” to the Board's interpretation of the GMA.”

*Lewis*, 157 Wn.2d at 498, ¶ 8 (citing *King Cy.*, 142 Wn.2d at 553). Here, the Court of Appeals gave no weight to the Board's interpretation of the GMA's adjacency requirement for UGA expansion in RCW 36.70A.110(1). Instead, it substituted its own “simple dictionary definition” of “adjacent,” without regard to statutory context or legislative intent. Appendix at 17, ¶¶ 34-35.

In contrast to the Court of Appeals, the Board's interpretation and application of the GMA's adjacency language to preclude the gerrymandered UGA expansion evident here is consistent with the legislative policy implemented through RCW 36.70A.110: the GMA's goal of preventing urban sprawl.<sup>23</sup> This Court has recognized the core GMA requirement that counties planning under it must designate urban

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<sup>23</sup> See *Skagit Surveyors & Eng'rs LLC v. Friends of Skagit Cy.*, 122 Wn.2d 542, 548, 860 P.2d 963 (1998) (the primary method for meeting the GMA's anti-sprawl goal is set forth in RCW 36.70A.110); *Quadrant*, 154 Wn.2d at 246, ¶ 37 (same).

growth areas “within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature.” *Quadrant*, 154 Wn.2d at 232, ¶ 11 (quoting RCW 36.70A.110(1)).

The Board’s interpretation also follows this Court’s direction that the plain meaning of a statutory term is to be derived not just from the dictionary, but “from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Thurston Cy.*, 148 Wn.2d at 12 (quoting *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)). In addition to dictionary definitions, the Court is to give “careful consideration to the subject matter involved, the context in which words are used, and the purpose of the statute.” *Quadrant*, 154 Wn.2d at 239 (quoting *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 693, 743 P.3d 793 (1987)). This approach “is more likely to carry out legislative intent” than simple resort to a dictionary definition of a word in isolation. *Thurston Cy.*, 148 Wn.2d at 12 (quoting *Campbell & Gwinn*, 146 Wn.2d at 11-12).

In this case, the Board’s interpretation of RCW 36.70A.110(1) is consistent with the plain statutory language and directly relates to the Legislature’s intent to control urban sprawl, while the Court of Appeals’ interpretation subverts the legislative intent and other provisions of the

same statute. Under the Court of Appeal's interpretation, any UGA expansion would comply with the GMA, no matter how illogical the boundary and no matter the character of the land included in the expansion, so long as some part of the UGA expansion "touches" the existing UGA.

The Court of Appeals' decision effectively eliminates any meaningful locational limit on UGA expansion, and it should be reversed. The Board's decision was amply supported by substantial evidence in the record, and reflected a proper legal interpretation of the statutory requirements in RCW 36.70A.110(1).

## VI. CONCLUSION

The Board's decisions should be affirmed and the Court of Appeals reversed.

RESPECTFULLY SUBMITTED this 2nd day of May, 2008.

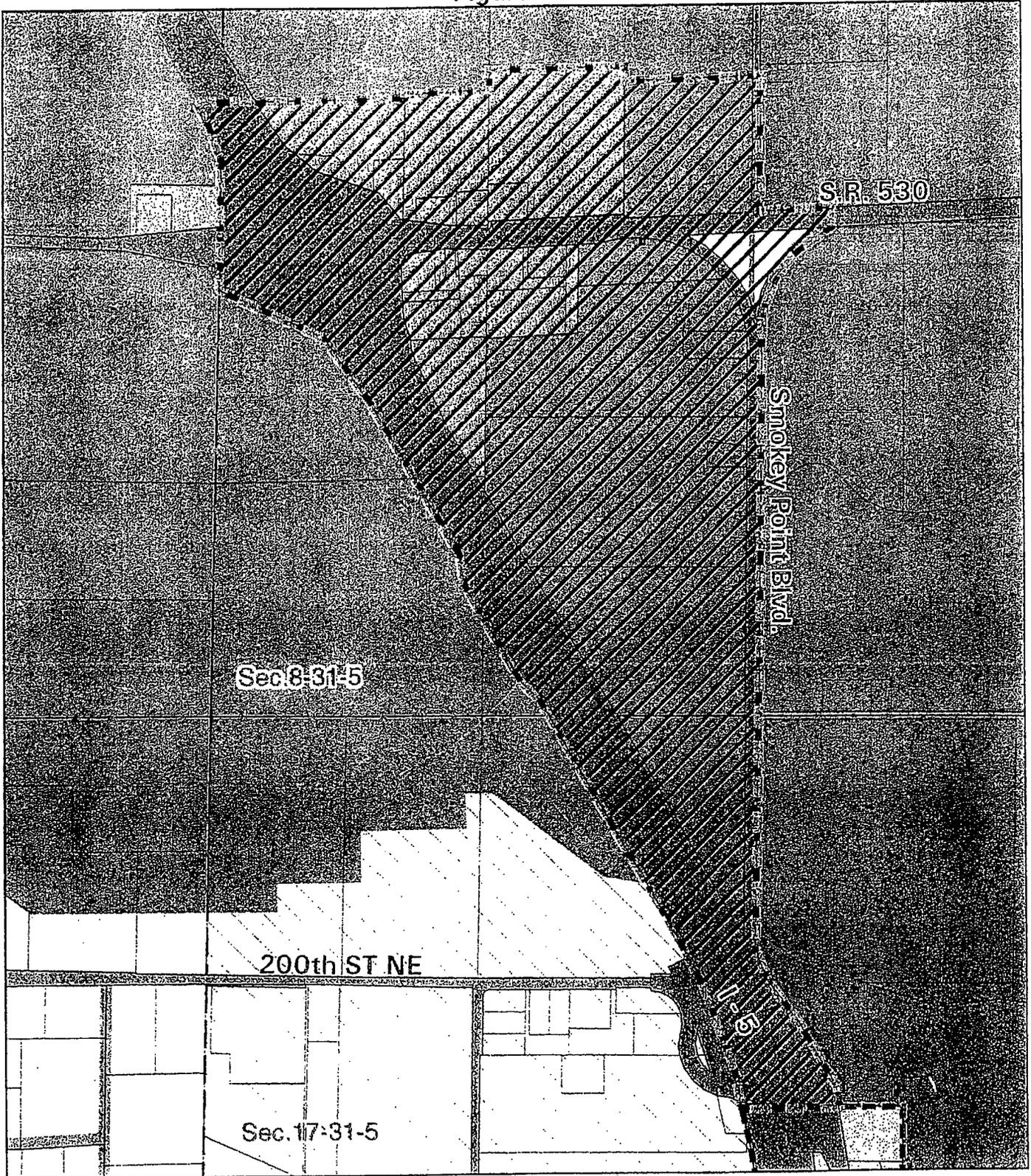
ROBERT M. MCKENNA  
Attorney General



Alan D. Copsey, WSBA #23305  
Assistant Attorney General  
Attorneys for the Director of the State of  
Washington Department of Community,  
Trade and Economic Development

# APPENDIX

Figure 1-3



Snohomish County 2003 Docket  
**Proposed Comprehensive Plan Amendment**  
**Dwayne Lane**



January 2003



LEGEND

Existing County Plan Designations

- Riverway Commercial Farmland
- Rural Freeway Service
- Rural Residential (1 DU/5 Acres Basic)
- Tribal Trust Lands
- Urban Low Density Residential (4 - 6 DU/Acre)
- Rural/Urban Transition Area

Proposed Plan Amendment



Dwayne Lane:  
 Redesignate Riverway  
 Commercial Farmland,  
 and Rural Freeway Service  
 to  
 Urban Commercial

- Incorporated Cities
- Existing Urban Growth Area Bdy

This map is a graphic representation derived from the Snohomish County Geographic Information System. It does not represent survey accuracy. Property lines are for illustrative purposes and depict only generalized parcels.  
 Produced by Snohomish County Planning Div., GIS Team  
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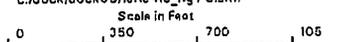
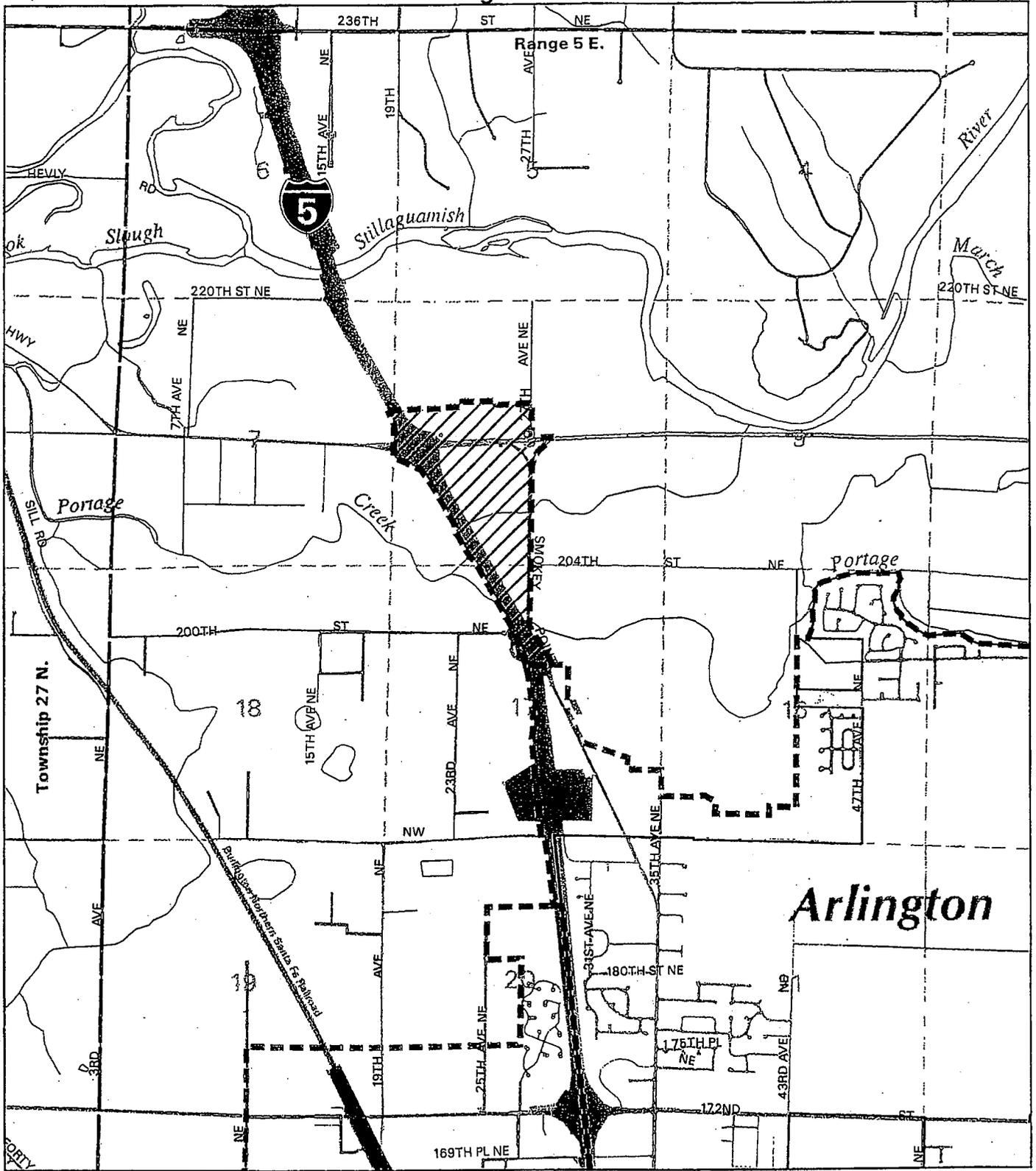


Figure 1-1



Snohomish County 2003 Docket  
Vicinity Map  
**Dwayne Lane**



LEGEND



Proposal Site

- Incorporated Cities
- Existing Urban Growth Area Bdy.

This map is a graphic representation derived from the Snohomish County Geographic Information System. It does not represent survey accuracy. Produced by Snohomish County Planning Div., GIS Team;cbl; c:\dock\dock03\lane-vicinity\_fig1-1.eml

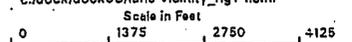




Figure 1-2



Snohomish County 2003 Docket  
 Proposed Comprehensive Plan Amendment  
**Dwayne Lane**

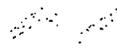


January 2003

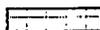


LEGEND

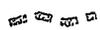
2001 Aerial Photo



Docket Proposal



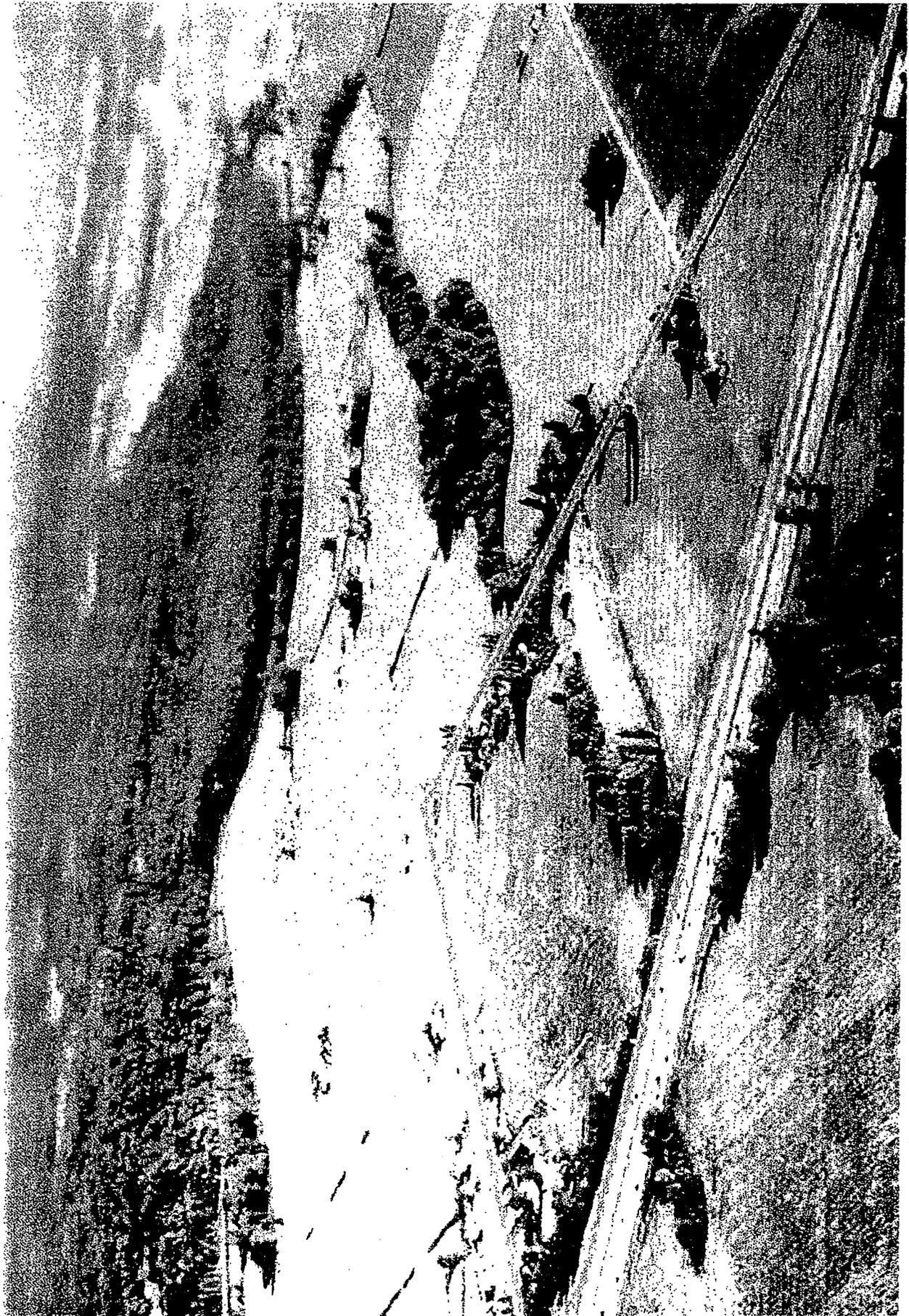
Incorporated Cities



Existing Urban Growth Area Bdy.

This map is a graphic representation derived from the Snohomish County Geographic Information System. It does not represent survey accuracy. Property lines are for illustrative purposes and depict only generalized parcels.

Produced by Snohomish County Planning Div., GIS Team:cbl  
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 Scale in Feet  
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**H**

City Of Arlington v. Central Puget Sound Growth Management Hearings Bd.  
Wash.App. Div. 1,2007.

Court of Appeals of Washington, Division 1.  
CITY OF ARLINGTON, Dwayne Lane and  
Snohomish County, Appellants,

v.

CENTRAL PUGET SOUND GROWTH  
MANAGEMENT HEARINGS BOARD, State of  
Washington; 1000 Friends of Washington nka  
Futurewise; Stillaguamish Flood Control District;  
Pilchuck Audubon Society; The Director of the  
State of Washington Department of Community,  
Trade, and Economic Development and Agriculture  
for Tomorrow, Respondents.  
No. 57253-9-I.

March 26, 2007.

Reconsideration Denied May 29, 2007.

**Background:** City, county, and landowner appealed determination of the Growth Management Hearings Board which determined that, under the Growth Management Act of 1990, county could not re-designate land from agricultural to commercial. The Superior Court, Snohomish County, Linda C. Krese, J., granted Board's motion to dismiss and also affirmed the decision on the merits, and city, county, and landowner appealed.

**Holdings:** The Court of Appeals, Grosse, J., held that:

- (1) report was sufficient to support county's determination that parcel had no long-term commercial significance for agricultural production;
- (2) parcel was already characterized by urban growth and was adjacent to other urban growth, and thus met the locational requirements for expansion of urban growth area;
- (3) current action was not barred on grounds of res judicata and collateral estoppel; and
- (4) burden was on Board to show that county's action did not comply with the Act.

Reversed and remanded.

See also 1996 WL 734917; 105 Wash.App. 1016, 2001 WL 244384

West Headnotes

[1] Zoning and Planning 414  279

414 Zoning and Planning

414V Construction, Operation and Effect

414V(C) Uses and Use Districts

414V(C)1 In General

414k278 Particular Terms and

Uses

414k279 k. Agricultural

Uses; Farm; Nursery; Greenhouse. Most Cited Cases Under the Growth Management Act of 1990, counties must designate agricultural lands that are not already characterized by urban growth and that have long term significance for the commercial production of food or other agricultural products. West's RCWA 36.70A.170(1)(a).

[2] Zoning and Planning 414  279

414 Zoning and Planning

414V Construction, Operation and Effect

414V(C) Uses and Use Districts

414V(C)1 In General

414k278 Particular Terms and

Uses

414k279 k. Agricultural

Uses; Farm; Nursery; Greenhouse. Most Cited Cases Counties must adopt development regulations to assure the conservation of those agricultural lands designated under the Growth Management Act of 1990. West's RCWA 36.70A.060(1)(a), 36.70A.170(1)(a).

[3] Zoning and Planning 414  167.1

414 Zoning and Planning

414III Modification or Amendment

414III(A) In General

414k167 Particular Uses or

Restrictions

414k167.1 k. In General. Most

Cited Cases

Report from consulting firm retained by interested landowner was sufficient to support county's determination that parcel of agricultural land had no long-term commercial significance for agricultural production for purposes of the Growth Management Act of 1990 such that county could redesignate land for urban commercial use, although other reports, including both a county planning and development services report and a draft supplemental environmental impact statement, concluded that the land was agricultural land of long-term commercial significance. West's RCWA 36.70A.170(1)(a); WAC 365-190-050(1).

**[4] Zoning and Planning 414 ↪ 279**

414 Zoning and Planning

414V Construction, Operation and Effect

414V(C) Uses and Use Districts

414V(C)1 In General

414k278 Particular Terms and

Uses

414k279 k. Agricultural Uses; Farm; Nursery; Greenhouse. Most Cited Cases "Agricultural land" for the purposes of the Growth Management Act of 1990 is, among other things, land that has long-term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity, and whether it is near population areas or vulnerable to more intense uses. West's RCWA 36.70A.170(1)(a).

**[5] Zoning and Planning 414 ↪ 279**

414 Zoning and Planning

414V Construction, Operation and Effect

414V(C) Uses and Use Districts

414V(C)1 In General

414k278 Particular Terms and

Uses

414k279 k. Agricultural Uses; Farm; Nursery; Greenhouse. Most Cited Cases Counties may consider the development-related factors enumerated in regulation outlining the minimum guidelines to classify agriculture, forest, mineral lands and critical areas in determining which lands have long-term commercial significance for purposes of the Growth Management Act of 1990. West's RCWA 36.70A.170(1)(a); WAC 365-190-050(1).

**[6] Zoning and Planning 414 ↪ 279**

414 Zoning and Planning

414V Construction, Operation and Effect

414V(C) Uses and Use Districts

414V(C)1 In General

414k278 Particular Terms and

Uses

414k279 k. Agricultural Uses; Farm; Nursery; Greenhouse. Most Cited Cases Parcel of agricultural land was already characterized by urban growth and was adjacent to other urban growth such that it met the locational requirements for expansion of urban growth area under the Growth Management Act of 1990, where land abutted the intersection of two freeways, contained existing freeway service structures, and had unique access to utilities, and land contained a 700-foot border of freeway and access road rights-of-way with adjacent urban growth area. West's RCWA 36.70A.110(1).

**[7] Zoning and Planning 414 ↪ 727**

414 Zoning and Planning

414X Judicial Review or Relief

414X(D) Determination

414k727 k. Effect of Decision. Most

Cited Cases

Issues in current action regarding whether county's exercise of its discretion in redesignating land as urban commercial and expanding urban growth area to include certain parcel was clearly erroneous in view of the entire record before the Growth Management Hearings Board and in light of the goals and requirements of the Growth Management Act of 1990 were not the same issues or claims that were before the Board and the courts in prior litigation concerning whether the county's previous decision to designate the land as agricultural was clearly erroneous, and thus current action was not barred on grounds of res judicata and collateral estoppel. West's RCWA 36.70A.320(1, 3).

**[8] Judgment 228 ↪ 584**

228 Judgment

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded

228k584 k. Nature and Elements of Bar or Estoppel by Former Adjudication. Most Cited Cases

Resurrecting the same claim in a subsequent action is barred by res judicata.

**[9] Judgment 228**  584

**228 Judgment**

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded

228k584 k. Nature and Elements of Bar or Estoppel by Former Adjudication. Most Cited Cases

Under the doctrine of res judicata, or claim preclusion, a prior judgment will bar litigation of a subsequent claim if the prior judgment has a concurrence of identity with the subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.

**[10] Judgment 228**  724

**228 Judgment**

228XIV Conclusiveness of Adjudication

228XIV(C) Matters Concluded

228k723 Essentials of Adjudication

228k724 k. In General. Most

Cited Cases

When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is barred by collateral estoppel.

**[11] Judgment 228**  634

**228 Judgment**

228XIV Conclusiveness of Adjudication

228XIV(A) Judgments Conclusive in General

228k634 k. Nature and Requisites of Former Adjudication as Ground of Estoppel in General. Most Cited Cases

Collateral estoppel, or issue preclusion, requires: (1) identical issues, (2) a final judgment on the merits, (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication, and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

**[12] Judgment 228**  720

**228 Judgment**

228XIV Conclusiveness of Adjudication

228XIV(C) Matters Concluded

228k716 Matters in Issue

228k720 k. Matters Actually Litigated and Determined. Most Cited Cases

**Judgment 228**  724

**228 Judgment**

228XIV Conclusiveness of Adjudication

228XIV(C) Matters Concluded

228k723 Essentials of Adjudication

228k724 k. In General. Most

Cited Cases

For collateral estoppel to apply, the issue to be precluded must have been actually litigated and necessarily determined in the prior action.

**[13] Zoning and Planning 414**  620

**414 Zoning and Planning**

414X Judicial Review or Relief

414X(C) Scope of Review

414X(C)1 In General

414k619 Matters of Discretion

414k620 k. Regulations.

Most Cited Cases

A county's decision to designate land agricultural or urban commercial, or to expand its urban growth area, is an exercise of its discretion that will not be overturned unless found to be clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the Growth Management Act of 1990. West's RCWA 36.70A.320(1,3).

**[14] Zoning and Planning 414**  167.1

**414 Zoning and Planning**

414III Modification or Amendment

414III(A) In General

414k167 Particular Uses or Restrictions

414k167.1 k. In General. Most

Cited Cases

County which wished to re-designate agricultural resource land as urban under the Growth Management Act of 1990 was not required to show a change in circumstances, but rather burden was on Growth Management Hearings Board to show that county's action did not comply with the Act. West's RCWA 36.70A.320(2).

**\*\*937** Steven James Peiffle, Attorney at Law, Arlington, WA, for Appellant City of Arlington.  
Todd Charles Nichols, Cogdill Nichols ReinWartelle

Andrews, Everett Wa, for Appellant Dwayne Lane.  
\*\*938 John Roberts Moffat Civil Div Snohomish  
County Prosecutor's Everett, WA, for Appellant  
Snohomish County.

FN1. 1996 WL 734917, pt. 8 of 10, at 86-87  
(Wash. Cent. Puget Sound Growth Mgmt.  
Hr'gs Bd. Mar. 12, 1996).

Martha Patricia Lantz, Office of Atty Gen, Lic &  
Admin Law Div, Olympia, for Respondent Central  
Puget Sound.

Alan D. Copsey, Office of the Atty General,  
Olympia, WA, for Respondent Dept. of Trade and  
Economic.

John T. Zilavy, Tim Trohimovich, Futurewise,  
Futurewise, Seattle, for Respondents Agriculture for  
Tomorrow Futurewise, Pilchuck Audubon Society.

Henry E. Lippek, The Public Advocate, Seattle, WA,  
for Respondent Stillaquamish Flood Control.

GROSSE, J.

\*6 ¶ 1 The Growth Management Hearings Board  
must find compliance with the Growth Management  
Act of 1990 (GMA) unless it determines that a  
county action is clearly erroneous in view of the  
entire record before the Board and in light of the  
goals and requirements of the GMA. Here, the Board  
failed to consider important evidence in the record  
that supports Snohomish County's finding that the  
land at Island Crossing was not land of long-term  
commercial significance to agriculture and thus  
eligible for redesignation to urban commercial use.  
Because, in light of the improperly dismissed  
evidence, the County's action redesignating the land  
was not clearly erroneous, we reverse and remand.

¶ 2 This appeal is the latest episode in a long fight  
over the designation of a triangular piece of land in  
Snohomish County located north of the City of  
Arlington. The land borders the interchange of  
Interstate 5 and State Road 530, and is part of an area  
known as Island Crossing.

#### *Prior Appeal*

¶ 3 The land at issue was designated and zoned  
agricultural in 1978. In 1995, Snohomish County  
adopted a comprehensive plan under the Growth  
Management Act (GMA). As part of the plan, the  
County redesignated Island Crossing as urban  
commercial and included it in Arlington's Urban  
Growth Area (UGA). The Growth Management  
Hearings Board affirmed the decision in \*7 Skyl  
Valley v. Snohomish County, No. 95-3-0068c (Final  
Decision and Order. 1996 WL 734917).<sup>FN1</sup>

¶ 4 In 1997, the Snohomish County Superior Court  
reviewed the Board's decision affirming the County's  
action and determined substantial evidence in the  
record did not support the redesignation of Island  
Crossing and the inclusion of the land in the UGA.  
Specifically, the superior court found that Island  
Crossing is in active/productive use for agricultural  
crops on a commercial scale and that the area is not  
characterized by urban growth under GMA standards.  
The superior court remanded to the Board for a  
detailed examination. The Board in turn ordered  
the County to conduct additional public hearings on  
this issue.

¶ 5 The County held public hearings and after  
considering the oral and written testimony and the  
Planning Commission's public hearings record, the  
Snohomish County Council passed two ordinances  
redesignating Island Crossing as agricultural resource  
land and removing it from Arlington's UGA.  
Specifically, the Council found that Island Crossing  
is devoted to agriculture and is actually used or is  
capable of being used as agricultural land. It also  
found that the area is in current farm use with  
interspersed residential and farm buildings. The  
County Executive approved the ordinances.

¶ 6 Dwayne Lane, a party in the current case and  
owner of 15 acres of land bordering Interstate 5 in  
Island Crossing, challenged the County's designation  
of Island Crossing as agricultural resource land.  
Lane planned to locate an automobile dealership on  
his land at Island Crossing. He filed a petition for  
review of the County's 1998 decision with the Board,  
contending that the County failed to comply with the  
GMA. The Board concluded the County complied  
with the GMA and that \*\*939 the County's  
conclusion was not clearly erroneous. The superior  
court affirmed the Board's decision.

\*8 ¶ 7 Lane then appealed to this court. Lane  
argued that the record did not support the Board's  
decision to affirm the County's designation of Island  
Crossing as agricultural resource land under the  
GMA. In an unpublished decision this court  
disagreed with Lane, concluding:

Island Crossing is composed of prime  
agricultural soils and has been described as  
having agricultural value of primary

significance. Except for the County's 1995 dedesignation of Island Crossing as agricultural land, Island Crossing has been designated and zoned agricultural since 1978. Thus, the record supports a finding that Island Crossing is capable of being used for agricultural production. Although Island Crossing borders the interchange of Interstate 5 and State Road 530, it is separated from Arlington by farmland. Indeed, the record contains evidence to indicate that most of the land in Island Crossing is being actively farmed, except a small area devoted to freeway services. Thus, the record indicates that the land is actually used for agricultural production. The only urban development permits issued for Island Crossing are for the area that serves the freeway. Further, the substantial shoreline development permit for sewer service in the freeway area explicitly "prohibits any service tie-ins outside the Freeway Service area." Thus, adequate public facilities and services do not currently exist. Although Lane speculates that it may be possible for him to obtain permits under exceptions to the present restrictions, he fails to demonstrate that such permits can be provided in an efficient manner as required by statute.

Although the record may contain evidence to support a different conclusion, this court cannot reweigh the evidence. Indeed, the record contains substantial evidence supporting the conclusion that the designation of Island Crossing as agricultural land encourages the conservation of productive agricultural lands and discourages incompatible uses in accordance with the GMA. And the removal of Island Crossing from Arlington's UGA is consistent with the GMA's goal to encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner. The record supports the Board's decision that the County's designation of Island Crossing as agricultural resource land was not clearly erroneous. Further, as discussed above, Lane \*9 failed to show that the Board made a legal error or that its decision was arbitrary and capricious. Thus, he failed to satisfy his burden of showing that the Board's action was invalid and, as a result, Lane is not entitled to relief.<sup>FN2</sup>

*FN2. Dwayne Lane v. Central Puget Sound Growth Mgmt. Hearings Bd., noted at 105 Wash.App. 1016, 2001 WL 244384 at\*5-6, 2001 Wash.App. LEXIS 425, at \*16-188 (citations omitted).*

#### *Current Appeal*

¶ 8 Two years later, in September 2003, the Snohomish County Council passed Amended Ordinance No. 03-063. The ordinance amended the County's Comprehensive Plan to add 110.5 acres in Island Crossing to the Arlington UGA, changed the designation of that land from Riverway Commercial Farmland (75.5 acres) and Rural Freeway Service (35 acres) to Urban Commercial, and rezoned the land from Rural Freeway Service and Agricultural-10 Acres to General Commercial.

¶ 9 An appeal was filed with the Board in October 2003. The Board divided the issues into three groups: the redesignation of agricultural resource land (issue 2); urban growth and expansion issues (issues 3 and 4); and critical areas issue (issue 5). The Board declined to address the critical areas issue and that issue is no longer part of this appeal.

¶ 10 Regarding the redesignation of Island Crossing as urban commercial from agricultural resource land, the Board stated in its Corrected Final Decision and Order that the petitioners had carried their burden of proof to show the ordinance failed to be guided by and did not substantively comply with RCW 36.70A.020(8) (planning goal to preserve natural resource land) and that it failed to comply\*\*940 with RCW 36.70A.040 (local governments must adopt development regulations that preserve agricultural lands), RCW 36.70A.060(1) (conservation of agricultural lands) and RCW 36.70A.170(1)(a) (designation of agricultural lands). The Board found that the County's action was unsupported by the record and thus was clearly erroneous in concluding \*10 that the land in Island Crossing no longer met the criteria for designation as agricultural land of long-term commercial significance and remanded the ordinance to the County to take legislative action to bring it into compliance with the goals and requirements of the GMA.

¶ 11 Regarding the Urban Growth Area and expansion issues the Board stated in its decision and order that petitioners had carried their burden of proof to show the ordinance failed to be guided by and did not substantively comply with RCW

36.70A.020(1),(2), and (8) (planning goals requiring encouragement of urban growth in urban growth areas, reduction of sprawl, enhancement of natural resource industries) and that it failed to comply with RCW 36.70A.110 and .215 (limiting UGA expansions to land necessary to accommodate projected future growth and setting priorities for the expansion of urban growth areas) and .210(1). The Board therefore concluded that the County's action regarding the UGA expansion was clearly erroneous and remanded the ordinance to the County to take legislative action to bring it into compliance with the goals and requirements of the GMA. Upon remand the County held new hearings, took new testimony and adopted a new land capacity analysis. Based on the new evidence, the County adopted Emergency Ordinance No. 04-057.

¶ 12 A compliance hearing was held by the Board in June 2004 and the Board entered an Order Finding Continuing Noncompliance and Invalidity and Recommendation for Gubernatorial Sanctions. The Board found that the County had achieved compliance with RCW 36.70A.215 but had failed to carry its burden of proving compliance with the other GMA provisions.

¶ 13 Snohomish County, the City of Arlington, and Dwayne Lane jointly appealed the Board's Amended Final Decision and Order and the Order on Compliance to the superior court. Futurewise and the Stillaguamish Flood Control District filed a motion to dismiss, claiming that the issue of whether the county ordinances complied with the \*11 GMA was barred by res judicata and collateral estoppel. The superior court granted the motion to dismiss and also affirmed the Board's decisions on the merits.

¶ 14 The City of Arlington, Snohomish County and Dwayne Lane appeal.

#### *Standard of Review*

¶ 15 The appropriate standard of review, as summarized in the recent Supreme Court opinion *Lewis County v. Western Washington Growth Management Hearings Board*,<sup>FN3</sup> is as follows:

FN3. *Lewis County v. Western Washington Growth Mgmt. Hearings Bd.*, 157 Wash.2d 488, 139 P.3d 1096 (2006).

The Growth Management Hearings Board is charged with adjudicating GMA compliance and invalidating noncompliant plans and

development regulations. RCW 36.70A.280, .302. The Board "shall find compliance" unless it determines that a county action "is clearly erroneous in view of the entire record before the board and in light of the goals and requirements" of the GMA. RCW 36.70A.320(3). To find an action "clearly erroneous," the Board must have a "firm and definite conviction that a mistake has been committed." *Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wash.2d 179, 201, 849 P.2d 646 (1993). On appeal, we review the Board's decision, not the superior court decision affirming it. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wash.2d 543, 553, 14 P.3d 133 (2000) (hereinafter referred to as *Soccer Fields*). "We apply the standards of RCW 34.05 directly to the record before the agency, sitting in the same position as \*\*941 the superior court." *Id.* (quoting *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wash.2d 38, 45, 959 P.2d 1091 (1998)).

The legislature intends for the Board "to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of" the GMA. RCW 36.70A.3201. But while the Board must defer to Lewis County's choices that \*12 are consistent with the GMA, the Board itself is entitled to deference in determining what the GMA requires. This court gives "substantial weight" to the Board's interpretation of the GMA. *Soccer Fields*, 142 Wash.2d at 553, 14 P.3d 133.<sup>[FN4]</sup>

FN4. *Lewis County*, 157 Wash.2d at 497-98, 139 P.3d 1096.

¶ 16 Furthermore, "[u]nder the Administrative Procedure Act (APA), chapter 34.05 RCW, a court shall grant relief from an agency's adjudicative order if it fails to meet any of nine standards delineated in RCW 34.05.570(3)."<sup>FN5</sup> Here, the appellants assert the Board engaged in unlawful procedure or decisionmaking process or failed to follow a prescribed procedure (RCW 34.05.570(3)(c)), the Board erroneously interpreted the law (RCW 34.05.570(3)(d)), the Board's order is not supported by evidence that is substantial when viewed in light of the whole record before the court (RCW 34.05.570(3)(e)), and the Board's order was arbitrary and capricious (RCW 34.05.570(3)(i)).

FN5. Lewis County, 157 Wash.2d at 498, 139 P.3d 1096.

¶ 17 Errors of law alleged under subsections (c) and (d) are reviewed de novo.<sup>FN6</sup> Errors alleged under subsection (e) are mixed questions of law and fact, where the reviewing court determines the law independently, then applies it to the facts as found by the Board.<sup>FN7</sup> Substantial evidence is “ ‘a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.’ ”<sup>FN8</sup>

FN6. Magula v. Dep't of Labor and Indus., 116 Wash.App. 966, 969, 69 P.3d 354 (2003) (citing City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd., 136 Wash.2d 38, 45, 959 P.2d 1091 (1998)).

FN7. Lewis County, 157 Wash.2d at 498, 139 P.3d 1096.

FN8. City of Redmond, 136 Wash.2d at 46, 959 P.2d 1091 (quoting Callegod v. State Patrol, 84 Wash.App. 663, 673, 929 P.2d 510 (1997)).

¶ 18 For the purposes of (i), arbitrary and capricious actions include “ ‘willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.’ ”<sup>FN9</sup> Furthermore, \*13 “ ‘[w]here there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.’ ”<sup>FN10</sup>

FN9. City of Redmond, 136 Wash.2d at 46-47, 959 P.2d 1091 (quoting Kendall v. Douglas, Grant, Lincoln & Okanogan County Pub. Hosp. Dist. No. 6, 118 Wash.2d 1, 14, 820 P.2d 497 (1991)).

FN10. City of Redmond, 136 Wash.2d at 47, 959 P.2d 1091 (quoting Kendall, 118 Wash.2d at 14, 820 P.2d 497).

*Redesignation of Island Crossing from Agricultural Resource Land to Urban Commercial*

[1][2] ¶ 19 Under the GMA, counties must designate “[a]gricultural lands that are not already characterized by urban growth and that have long term significance for the commercial production of food or other agricultural products.”<sup>FN11</sup> Furthermore, counties must adopt development regulations “to assure the conservation of” those

agricultural lands designated under RCW 36.70A.170.<sup>FN12</sup>

FN11. RCW 36.70A.170(1)(a); see also, Lewis County, 157 Wash.2d at 498-99, 139 P.3d 1096.

FN12. RCW 36.70A.060(1)(a); see also Lewis County, 157 Wash.2d at 499, 139 P.3d 1096.

¶ 20 While this case was awaiting oral argument the definition of “agricultural land” for GMA purposes was addressed by the Supreme Court in Lewis County v. Western Washington Growth Management Hearings Board. The court held that three factors must be met before land may be designated agricultural land for the purposes of the GMA. The court stated:

\*\*942 [A]gricultural land is land: (a) not already characterized by urban growth (b) that is primarily devoted to the commercial production of agricultural products enumerated in RCW 36.70A.030(2), including land in areas used or capable of being used for production based on land characteristics, and (c) that has long-term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity, and whether it is near population areas or vulnerable to more intense uses. We further hold that counties may consider the development-related factors enumerated in WAC 365-190-050(1) in determining which lands have long-term commercial significance. [<sup>FN13</sup>]

FN13. Lewis County, 157 Wash.2d at 502, 139 P.3d 1096.

\*14 The WAC factors include:

- (a) The availability of public facilities;
- (b) Tax status;
- (c) The availability of public services;
- (d) Relationship or proximity to urban growth areas;
- (e) Predominant parcel size;
- (f) Land use settlement patterns and their compatibility with agricultural practices;
- (g) Intensity of nearby land uses;
- (h) History of land development permits issued nearby;

- (i) Land values under alternative uses; and
- (j) Proximity of markets.<sup>[FN14]</sup>

FN14. WAC 365-190-050(1).

¶ 21 In the ordinances at issue in this case, Snohomish County made the following finding regarding whether the land in question was agricultural land for GMA purposes:

The land contained within the Island Crossing Interchange Docket Proposal is not agricultural land of long term commercial significance. Although some of the soils may be of a type appropriate for agricultural use, soil type is only one factor among many others in the legal test for agricultural land of long term commercial significance. The County Council has addressed the question as to whether the land is:

“primarily devoted to the commercial production of agricultural products and has long term commercial significance for agricultural production”

and found that it is not.

At the public hearing, the testimony of Mrs. Roberta Winter (Exh. 111) was very persuasive on this point. Since the mid-1950's, she and her husband had a dairy farm in the very location of the Island Crossing Interchange Docket Proposal site. Locating and then expanding I-5 put them out of the dairy business. They soon discovered that crops generated less revenue than the property taxes. The Winters sold the land because the land could not be profitably farmed.

\*15 Council finds that this land cannot be profitably farmed, and is not agricultural land of long term commercial significance.

[3] ¶ 22 The Board found that the County's action in redesignating the land was clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA. We find the Board erred in concluding the County committed clear error in determining the land in question has no long-term commercial significance for agricultural production. There is evidence in the record supporting the County's determination on this point, and the Board wrongly dismissed this evidence. Because this evidence supports the County's finding that the land at Island Crossing has no long-term

commercial significance for agricultural production, the Board erred in not deferring to the County's decision to redesignate the land for urban commercial use.

[4][5] ¶ 23 As stated in the *Lewis* decision, agricultural land for the purposes of the GMA is, among other things, land that “has long-term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity, and whether it is near population areas or vulnerable to more intense uses.”<sup>FN15</sup> Furthermore, “counties may consider the development-related \*\*943 factors enumerated in WAC 365-190-050(1) in determining which lands have long-term commercial significance.”<sup>FN16</sup>

FN15. *Lewis County*, 157 Wash.2d at 502, 139 P.3d 1096.

FN16. *Lewis County*, 157 Wash.2d at 502, 139 P.3d 1096.

¶ 24 In regards to whether the land at Island Crossing has long-term commercial significance for agricultural production, the Board stated:

2. *Do the 75.5 acres of land at Island Crossing have long-term commercial significance?*

Again, the Board answers in the affirmative. The County relies on Finding T, set forth in Finding of Fact 3, *supra*, to support its conclusion that the Riverway Commercial Farmland no longer has long-term commercial significance. The “evidence” relied \*16 upon is testimony from an individual who operated a dairy farm in the vicinity fifty years ago who opined that she sold her farm “because the land could not be profitably farmed.” Ex. 111. Anecdotal testimony, particularly from an individual whose direct experience with the area is decades removed from the present and whose declared was in dairy rather than crop farming, does not constitute credible evidence on which to support the County's action. Also, as Petitioners noted, this “Finding” was contradicted by others with present-day experience in crop farming in the Stillaguamish Valley.

The Board went on to cite the report of the Snohomish County Planning and Development

Services (PDS), the Draft Supplemental Environmental Impact Statement (DSEIS), the United States Department of Agriculture (USDA) soils report, and the recommendations of the Snohomish County Agricultural Advisory Board as substantial evidence contrasting sharply with the testimony relied upon by the County.

¶ 25 For example, both the PDS report and DSEIS specifically address the relevant WAC factors and conclude that the land in question is agricultural land of long-term commercial significance:

Analyses of the proposal conducted by PDS conclude that under the GMA's minimum guidelines for classification of agricultural lands, the portion of the proposal site currently designated and zoned for agricultural uses should continue to be classified as such. This conclusion is based on the following analysis of the GMA guidelines:

- *Availability of Public Facilities:* Public water and sanitary sewer facilities are physically located in and adjacent to the proposal site. However, sanitary sewer service is restricted by the [General Policy Plan (GPP) ] to Urban Growth Areas. The shoreline substantial development permit for the existing sewer line restricts availability of sanitary sewer to the existing parcels zoned Rural Freeway Service.
- *Tax Status:* Several large parcels in the area (approximately 32% of the area) are classified as Farm and Agricultural Land by the Snohomish County Assessor and are valued at their current use rather than "highest and best use." The other parcels in the area, however, are valued and taxed at their "highest and best use".
- *\*17 Availability of Public Services:* Public Services such as public water and sanitary sewer service are physically located within and adjacent to the proposal site. However, sanitary sewer service is restricted by the GPP to Urban Growth Areas. The existing sanitary sewer line is available by conditions in the shoreline substantial development permit to existing parcels zoned Rural Freeway Service.
- *Relationship or proximity to urban growth are as:* The proposal site is approximately

0.9 miles from the Arlington city limits and is functionally separated from the City because it is within the Stillaguamish River floodplain. The southern tip of the proposal site, however, is adjacent to the Arlington UGA.

- *Land Use Settlement Patterns and Compatibility with Agricultural Practices:* Most of the proposal site is currently in farm use with interspersed residential and farm buildings.

- **\*\*944** • *Predominant Parcel Size:* Predominant parcel sizes are large and of a size typically found in areas designated commercial farmland. Nine parcels are located within the 75.5 acres of the proposal site designated Riverway Commercial Farmland. Approximate sizes of these parcels are 20.7 acres, 15.8 acres, 14.6 acres, 8.1 acres, 2.9 acres, and three smaller parcels.

- *Intensity of Nearby Uses:* More intense land uses and urban land developments are located within the Rural Freeway Commercial node at the I-5/SR 530 interchange that has existed essentially in its present configuration since 1968. Farmland is located immediately to the east, and, separated by I-5, to the west.

- *History of Land Development Permits Issues Nearby:* No urban development permits have been issued in the vicinity of the proposal site except for the substantial shoreline development permit issued for the sewer line that serves only the existing rural freeway commercial uses.

- *Land Values under Alternative Uses:* The area of the proposal site outside of the Rural Freeway Service designation is in the floodway fringe area of the Stillaguamish River. Higher uses than farming would be difficult to locate in the area because of the floodplain constraints.

- *\*18 Proximity of Markets:* Markets within Arlington, Marysville, and Stanwood are located in close proximity to the site.

In addition, soils in the proposal area are prime farmland soils as defined by the [United States Department of Agriculture Soil Conservation Service (SCS) ] and Snohomish County....

Based on review of the site characteristics and

the GMA criteria, the proposal area meets the criteria for an agricultural area of long-term commercial significance. The proposal area contains prime farmland soils, is not characterized by urban growth, and is adjoined by uses that are compatible with agricultural practices.

Respondents argue that the DSEIS is unique because it is "the only comprehensive, GMA-focused analysis" in the record.

¶ 26 However, Dwayne Lane, a litigant in this case, hired consulting firm Higa-Burkholder to conduct a similar analysis employing the WAC criteria, and Higa-Burkholder came to the opposite conclusion. Higa-Burkholder's analyzed the WAC factors as follows:

(a) *Availability of public facilities:* The interchange is currently serviced by water and sewer, power, telecommunications, and gas. The fact that sewer expansion is limited by the existing Shoreline permit (1977) only means that to expand sewer service, a proposal must be approved by the Snohomish County Council under a Shoreline Permit application. In fact, the facilities exist and, in the case of water are in use.

(b) *Tax Status:* All but one parcel is smaller than 20 Acres Minimum for Open Space Taxation. Many property owners are being assessed tax rates that, according to the Snohomish County Assessor's Office, reflect "freeway influence" implying that the County believes that these properties have a "higher and better use" than agriculture. Taxes on this land are higher than the revenues generated from farming. Tax assessments reflect the availability of water.

(c) *Availability of Public Services:* Island Crossing has automobile services, lodging, food, and transit access.

(d) *Relationship and Proximity to UGA:* The Arlington UGA border is the southern boundary of the subject area. The \*19 City will annex the area through a special election in November of 2003.

(e) *Predominant Parcel Size:* The 1982 Snohomish County Agricultural Provision Plan (SCAPP) suggests the optimum size for

agricultural parcels is 40 acres with 20 acres minimum for crop production if adjacent to other large parcels. Minimum size for specialty crops is ten acres. A majority of the parcels are smaller than the 20 acres \*\*945 considered minimum for large-scale farming and for qualification for the open space tax abatement program for agriculture.

(f) *Land Use and Settlement Patterns and Their Compatibility with Agricultural Practices:* Well-documented conflicts exist with traffic and urban development. Traffic counts have increased to the point where it is dangerous for farm vehicles to cross the highway and certainly to pasture animals that often escape endangering the traveling public. These things limit the viability of agricultural [sic].

(g) *Intensity of Nearby Land Uses:* This interchange represents one of two connections to I-5 for a large market area including Darrington, Arlington, Smokey Point and North Marysville. These communities have been some of the fastest growing areas in Snohomish County. Arlington has approved the development of an Airport Industrial Park that has the potential to add 4000 jobs to the community, half of which will use the Island Crossing Interchange over the next ten years.

The Stillaguamish Tribe has developed a tribal center that includes several high traffic generating businesses including a smoke shop, a pharmacy, fireworks store, a police station and a community center. This development is located at the intersection of SR 530 and Old Highway 99. Currently, the Tribe's property is served by City of Arlington Water, but it has no public sewer service. The Tribe has plans to expand their operation at Island Crossing by purchasing other land and converting it to Trust Land.

(h) *History of Development Permits Nearby:* Over 200 homes have recently been developed on 47th Street NE less than one half mile from Island Crossing. Smokey Point Boulevard has been the center of residential growth over the past ten years. Island Crossing represents one of two access points to I-5 for all of this growth.

\*20 (i) *Land Values under Alternative Uses:*

Island Crossing has the potential to benefit Snohomish County economically. Jobs, sales tax revenue and property taxes are but a few of the economic benefits.

(j) *Proximity to Markets*: Although this area is in the Puget Sound population center and access to markets for farm products is close by, most production is occurring elsewhere, for example, in Eastern Washington where fewer conflicts with urban land uses, access to large parcels and lower priced land make agriculture viable. Twin City Foods imports its raw product from the east side of the State and no longer grows product in this area.

¶ 27 Relying on our Supreme Court's decision in *Redmond*, the Board dismissed the entire Higa-Burkholder analysis out of hand. Specifically, the Board construed the Higa-Burkholder report to be "reflections, if not direct expressions, of 'landowner intent'" and assigned it "the appropriate weight."

¶ 28 The Board incorrectly relied on *Redmond* to dismiss this evidence. In *Redmond*, the Supreme Court analyzed the meaning of the phrase "devoted to" as used in the GMA definition of agricultural land and held:

While the land use on the particular parcel and the owner's intended use for the land may be considered along with other factors in the determination of whether a parcel is in an area primarily devoted to commercial agricultural production, neither current use nor landowner intent of a particular parcel is conclusive for purposes of this element of the statutory definition.<sup>FN17</sup>

<sup>FN17.</sup> *City of Redmond*, 136 Wash.2d at 53, 959 P.2d 1091.

All *Redmond* holds is that a landowner cannot control whether land is primarily devoted to agriculture by taking his or her land out of agricultural production. It does not say the Board may dismiss evidence supporting the County's decision if it was obtained at the request of an interested party. The Board erroneously used \*21 *Redmond* as a tool with which to dismiss of an important piece of evidence that supported the County's position with regards to whether Island Crossing \*\*946 was agricultural land of long-term commercial significance. To the extent this evidence supports the County's conclusion that the land was not of long-term commercial

significance to agricultural production, and we find that it does, the Board would be required under the GMA to defer to the County and affirm its decision redesignating the land urban commercial.

#### *Expansion of the Arlington UGA*

¶ 29 The Board also found the expansion of the Arlington UGA in Amended Ordinance No. 03-063 did not comply with the GMA for two reasons. First, the Board found the record did not contain a valid land capacity analysis demonstrating a need for additional commercial land. In response, the County submitted a Large Plot Parcel Analysis prepared by Higa-Burkholder<sup>FN18</sup> as part of its statement of compliance and the Board found this action cured noncompliance with RCW 36.70A.215. This issue is therefore not part of this appeal.

<sup>FN18.</sup> This is a different report than the one that evaluated whether the land at Island Crossing was agricultural land of long-term commercial significance.

[6] ¶ 30 Second, the Board found the Expanded UGA including Island Crossing did not meet the locational requirements of RCW 36.70A.110(1), which states in pertinent part:

An urban growth area may include territory that is located outside of a city *only if such territory already is characterized by urban growth* whether or not the urban growth area includes a city, *or is adjacent to territory already characterized by urban growth*, or is designated new fully contained community as defined by RCW 36.70A.350.<sup>[FN19]</sup>

<sup>FN19.</sup> RCW 36.70A.110(1) (emphasis added).

The Board concluded in its Corrected Final Decision and Order:

As to whether the expanded UGA for Island Crossing meets the *locational* requirements of RCW 36.70A.110, the Board agrees \*22 with Petitioners. The closest point of contact between Arlington's city limits and private property within the expansion area is approximately 700 feet.... Also, the fact that limited sewer service is adjacent to, or even existing within, a rural area is not dispositive on the question of whether the area is urban in

character. Therefore, the Board concludes the subject property is not "adjacent to land characterized by urban growth," and does not comply with RCW 36.70A.110(1).<sup>FN20</sup>

FN20. (Emphasis in original).

The Board explained further in its Order Finding Continuing Noncompliance:

No new facts or reasoning are presented to disturb the Board's conclusions that Island Crossing continues to have agricultural lands of long-term commercial significance, that the presence of a sewer line is irrelevant, particularly given its limitations, that the freeway service uses do not rise to the status of "urban growth," and that Island Crossing is not "adjacent" to the Arlington UGA or a residential "population" of any sort. In fact, the private lands within this proposed UGA expansion would be connected to the Arlington UGA only by means of a 700 foot long 'cherry stem' consisting of nothing but public right-of-way.... While such dramatically irregular boundaries were common in the pre-GMA era, the meaning of "adjacency" under the GMA precludes such behavior.

¶ 31 "Urban growth" is defined in the GMA as: growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170. A pattern of more intensive rural development, as provided in RCW 36.70A.070(5)(d), is not urban growth. When allowed to spread over wide areas, urban growth typically requires urban governmental services. "*Characterized by urban growth*" refers to land having urban growth located on it, or \*23 to land located in relationship to an area with urban growth \*\*947 on it as to be appropriate for urban growth.<sup>[FN21]</sup>

FN21. RCW 36.70A.030(18) (emphasis added).

¶ 32 We find that the unique location of the land at Island Crossing as abutting the intersection of two

freeways and its connection to the Arlington UGA together meet the requirements of RCW 36.70A.110(1). Thus, the County's reliance on such facts in expanding the Arlington UGA was proper and the Board's decision reversing the County's action is erroneous.

¶ 33 The County stated in its ordinance: "This land is located at an I-5 interchange between an interstate highway and a state highway, and is uniquely located for commercial needs of the area.... This land has unique access to utilities." In other words, the County concluded that the land is appropriate for urban growth because the land is located at a highway interchange and has unique access to utilities. The County also acknowledged the land has existing freeway service structures on it and is adjacent to the City of Arlington's urban growth area. Taken together, these facts at least support a conclusion that the land in question is "located in relationship to an area with urban growth on it as to be appropriate for urban growth" and thus characterized by urban growth.<sup>FN22</sup>

FN22. RCW 36.70A.030(18).

¶ 34 Furthermore, the Board's conclusion that Island Crossing is not adjacent to the Arlington UGA for GMA purposes is also erroneous. It is undisputed that the area in question borders Arlington's UGA. The question posed here is whether the 700 foot border consisting entirely of freeway and access road rights-of-way constitute the adjacency to "territory already ... characterized by urban growth" required by RCW 36.70A.110(1). In reaching its decision the Board emphasized the geography and topography of the land in question and decided that in this case such concerns should control whether the land involved was \*24 adjacent to land characterized by urban growth, and not simply the 700 foot UGA boundary to the south.

¶ 35 The Board offers no support for its definition of "adjacent," which to the Board implies something more than the simple dictionary definition of "abutting" or "touching." We decline to adopt the Board's definition of adjacent in favor of the plain meaning of the term. Because the land in question touches the Arlington UGA, it is adjacent to territory already characterized by urban growth for the purposes of RCW 36.70A.110(1).

*Res Judicata and Collateral Estoppel*

[7] ¶ 36 The parties argue much over whether the

issues of res judicata and collateral estoppel were timely raised below; however, an analysis of the issues on the merits reveals the superior court erred in granting the motion to dismiss the appeal based on res judicata and collateral estoppel.

[8][9] ¶ 37“Resurrecting the same claim in a subsequent action is barred by res judicata.” <sup>FN23</sup> Under the doctrine of res judicata, or claim preclusion, “a prior judgment will bar litigation of a subsequent claim if the prior judgment has ‘a concurrence of identity with [the] subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.’ ” <sup>FN24</sup>

FN23. *Hilltop Terrace Ass'n v. Island County*, 126 Wash.2d 22, 31, 891 P.2d 29 (1995).

FN24. *In re Election Contest Filed by Coday*, 156 Wash.2d 485, 500-01, 130 P.3d 809 (2006) (quoting *Loveridge v. Fred Meyer, Inc.*, 125 Wash.2d 759, 763, 887 P.2d 898 (1995)).

[10][11][12] ¶ 38“When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is barred by collateral estoppel.” <sup>FN25</sup> Collateral estoppel, or issue preclusion, requires:

FN25. *Hilltop Terrace Ass'n*, 126 Wash.2d at 31, 891 P.2d 29.

\*25 “(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on \*\*948 the party against whom the doctrine is to be applied.”<sup>1</sup> <sup>FN26</sup>

FN26. *Shoemaker v. Bremerton*, 109 Wash.2d 504, 507, 745 P.2d 858 (1987) (quoting *Malland v. Dep't of Retirement Sys.*, 103 Wash.2d 484, 489, 694 P.2d 16 (1985)).

“In addition, the issue to be precluded must have been actually litigated and necessarily determined in the prior action.” <sup>FN27</sup>

FN27. *Shoemaker*, 109 Wash.2d at 508, 745 P.2d 858.

¶ 39 Here, the superior court dismissed the appeal on grounds that the appellants' claims were barred by res judicata and collateral estoppel. The superior court stated in its Decision on Appeal Affirming Growth Board:

4.2 In prior proceedings involving many of the same parties, in 1998 the Board affirmed Snohomish County's designation of the subject property (Island Crossing property) as agricultural resource land (75.5 acres) and Rural Freeway Service (35 acres) and removed it from the Arlington urban growth area (UGA). That decision was eventually affirmed by the Court of Appeals in an unreported decision (*Dwayne Lane v. Central Puget Sound Growth Management Hearings Board*, No. 46773-5-1), 105 Wash.App. 1016, 2001 WL 244384. In order to re-designate the land, the County must show that there has been a change in circumstances since 1998, and that the property is no longer properly designated as agricultural resource land and Rural Freeway service.

4.3 The Petitioners have failed to demonstrate any material change in circumstances justifying a change in the designation of the land.

¶ 40 The superior court explained further in its oral decision:

As I've already stated, these issues have twice before been the subject of proceedings before the Board and the Court. *On both occasions the Court has held that the lands should be properly designated as agricultural, and that the area should \*26 not be included in the Urban Growth Area.* The causes of action are identical, the persons and parties are the same, although on the second appeal in 2001, the County was on the other side. I don't think this detracts from the applicability of the other principles and the quality of the parties are the same. <sup>FN28</sup>

FN28. (Emphasis added).

¶ 41 The superior court in its decision and the respondents in their briefs misstate the issues and claims that were before the Board and the courts. The inquiry before the Board and the courts in the prior litigation was not whether the land was properly designated agricultural resource land as opposed to

urban commercial land. The inquiry was whether the County committed clear error in designating the land agricultural in view of the entire record before the Board and in light of the goals and requirements of the GMA. This distinction is crucial.

¶ 42 In the prior Island Crossing litigation we ultimately held “the Board’s decision that the County’s designation of Island Crossing as agricultural resource land was not clearly erroneous.”<sup>FN29</sup> This court did not hold that the land was agricultural resource land of long-term commercial significance. We could not have done so even had we tried. This is because the Board’s review is limited to whether “the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA],”<sup>FN30</sup> and our review was limited to whether the Board’s decision was supported by substantial evidence or was arbitrary and capricious.

FN29. Dwayne Lane v. Central Puget Sound Growth Management Hearings Board, 2001 WL 244384 at \*5-6, 2001 Wash.App. LEXIS 425, at \*18.

FN30. RCW 36.70A.320(3).

[13] ¶ 43 Because clear error is such a high standard to meet, it follows that situations may exist where a county could properly designate land either agricultural or urban commercial depending on how the county exercises its discretion in planning for growth, without committing clear error. \*27 The legislature recognized this when it implemented the clear error standard of review:

\*\*949 In recognition of the *broad range of discretion* that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant great deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter.<sup>FN31</sup>

FN31. RCW 36.70A.320(1) (emphasis added).

A county’s decision to designate land agricultural or urban commercial, or to expand its urban growth area, is thus an exercise of its discretion that will not be overturned unless found to be clearly erroneous in view of the entire record before the board and in light

of the goals and requirements of the GMA.

¶ 44 In the present case, the issues include whether the County’s exercise of its discretion in redesignating the same land as urban commercial and expanding the Arlington UGA to include Island Crossing was clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA. This is not the same issue or claim that was before the Board and the courts in the prior litigation. As stated before, the issue in that litigation was whether the County’s decision to designate the land agricultural was clearly erroneous. The superior court’s decision to bar the appeal on res judicata and collateral estoppel grounds was in error. The appellants were entitled to a decision on appeal as to whether the County’s subsequent decision to redesignate Island Crossing was clearly erroneous.

¶ 45 In short, simply because the Board and courts previously held that the agricultural designation was not clearly erroneous in view of the record and in light of the GMA, does not mean that an urban commercial designation would be clearly erroneous in view of the same or similar record and in light of the goals and requirements of the GMA. The prior judgment and the current litigation do not \*28 involve the same claim, nor are the issues identical. Thus, the superior court should not have precluded the petitioners from challenging the Snohomish County ordinances at issue in this case.

[14] ¶ 46 The superior court’s decision is erroneous in another respect. Specifically, the superior court’s holding that “[i]n order to re-designate the land, the County must show that there has been a change in circumstances since 1998, and that the property is no longer properly designated as agricultural resource land and Rural Freeway service” impermissibly shifts the burden away from the petitioners. Under RCW 36.70A.320(2), “the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under [the GMA] is not in compliance with the requirements of [the GMA].” In the court of appeals decision in *City of Redmond v. Central Puget Sound Growth Management Hearings Board* (hereinafter referred to as *Redmond II*),<sup>FN32</sup> we held that the Board erroneously placed the burden on the city to demonstrate conclusive evidence of changed circumstances in order to justify the de-designation of agricultural resource land. The superior court’s ruling that the County be required to show evidence of changed circumstances in order to overcome collateral estoppel and res judicata thus directly conflicts with the statutorily mandated burden of

proof set forth in RCW 36.70A.320(2) and affirmed in *Redmond II*.

FN32. *City of Redmond*, 116 Wash.App. 48, 56, 65 P.3d 337 (2003).

¶ 47 In sum, we hold the Board erred in finding the County committed clear error in concluding that the land at Island Crossing had no long term commercial significance to agricultural production. The Board erred because it dismissed a key piece of evidence that supported the County's conclusion on this point. Because there is evidence \*29 in the record to support the County's conclusions, the Board should have deferred to the County.<sup>FN33</sup>

FN33. See RCW 36.70A.3201.

¶ 48 Furthermore, we hold the Board erred in finding the County committed clear error in including the land at Island Crossing within the newly expanded Arlington UGA. There are facts in the record to support the conclusions that the land in question is characterized by urban growth and/or adjacent to \*\*950 territory already characterized by urban growth.

¶ 49 Finally, we hold the superior court erred in dismissing the appeal on res judicata and collateral estoppel grounds. We thus reverse and remand this matter to the Board for a decision consistent with the opinion of this court.<sup>FN34</sup>

FN34. RCW 34.05.574(1); *Manke Lumber Co. v. Diehl*, 91 Wash.App. 793, 809-10, 959 P.2d 1173 (1998).

WE CONCUR: SCHINDLER, A.C.J., and COLEMAN, J.

Wash.App. Div. 1, 2007.  
City Of Arlington v. Central Puget Sound Growth Management Hearings Bd.  
138 Wash.App. 1, 154 P.3d 936

END OF DOCUMENT

**CENTRAL PUGET SOUND  
GROWTH MANAGEMENT HEARINGS BOARD  
STATE OF WASHINGTON**

1000 FRIENDS OF WASHINGTON,  
STILLAGUAMISH FLOOD CONTROL  
DISTRICT, AGRICULTURE FOR  
TOMORROW, PILCHUCK AUDUBON  
SOCIETY;

and

THE DIRECTOR OF THE STATE OF  
WASHINGTON DEPARTMENT OF  
COMMUNITY, TRADE AND  
ECONOMIC DEVELOPMENT,

Petitioners,

v.

SNOHOMISH COUNTY,

Respondent,

and

DWAYNE LANE,

Intervenor.

Case No. 03-3-0019c

**CORRECTED  
FINAL DECISION AND ORDER**

**I. SYNOPSIS**

In October of 2003, five organizations<sup>1</sup> filed Petitions for Review with the Growth Management Hearings Board alleging that Snohomish County Ordinance No. 03-063 was not guided by the goals of the Growth Management Act and did not comply with the requirements of the GMA. Ordinance No. 03-063 made three changes to the County's comprehensive land use plans and development regulations relative to a 110.5 acre unincorporated area referred to as Island Crossing: (1) it changed the land use

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<sup>1</sup> The organizations challenging the County's action included 1000 Friends of Washington, the Washington State Department of Community, Trade and Economic Development, and the Stillaguamish Flood Control District.

designations for 75.5 acres of "Riverway Commercial Farmland" and 35.5 acres of "Rural Freeway Service" to "Urban Commercial;" (2) it rezoned these lands from "Rural Freeway Service" and "Agriculture-10 Acres" to "General Commercial," and (3) it revised the urban growth area boundary to include the entirety of the Island Crossing area within the urban growth area for the City of Arlington. Joining Snohomish County in defending its action was Intervenor Dwayne Lane, the owner of property within the Island Crossing area.

The Board agrees with the Petitioners that Snohomish County Ordinance No. 03-063 **does not comply** with the goals and requirements of the GMA, specifically its provisions regarding conservation of agricultural resource lands and the provisions regarding the expansion of urban growth areas. Because the Board finds these two independent reasons for remanding Ordinance No. 03-063 to the County, it concludes that it need not reach the question of whether the County's action also violated the GMA's provisions regarding protection of critical areas.

The Board directs Snohomish County to take legislative action to bring Ordinance No. 03-063 into compliance with the goals and requirements of the GMA by **May 24, 2004**. The Board further finds that the continued validity of Ordinance No. 03-063 during the period of remand would substantially interfere with fulfillment with the goals of the Act regarding conservation of agricultural land, directing development to urban areas and reducing sprawl. Therefore, the Board enters a **Determination of Invalidity** with respect to the following portions of Ordinance No. 03-063:

- The portion that expanded the Arlington urban growth area by 110.5 acres to include the Island Crossing area.
- The portion that replaced the 75.5 acre area of Riverway Commercial Farmland designation with an Urban Commercial designation
- The portion that rezoned the 75.5 acres of A-10 to General Commercial (GC)
- The portion that replaced the 35.5 acre area of Rural Freeway Service with an Urban Commercial designation
- The portion that rezoned the 35.5 acres of Rural Freeway Service (RFS) to General Commercial

The Board notes that Section 6 Ordinance 03-063 explicitly provides that "if any provision of this ordinance is held invalid or unconstitutional, then the provision in effect prior to the effective date of this ordinance shall be in full force and effect for that individual provision as if this ordinance had never been adopted."

## **II. BACKGROUND**

### **A. HISTORY OF GMA LITIGATION RE: ISLAND CROSSING**

1. Among the seventy issues challenging the GMA compliance of Snohomish County's first comprehensive plan in 1996 was an allegation by Pilchuck Audubon Society that the County had violated the agricultural resource lands provisions of the Growth

Management Act in removing from resource lands designation lands in the Island Crossing Area. The Board upheld the County's action. CPSGMHB, *Sky Valley, et al., v. Snohomish County*, Final Decision and Order, Case No. 96-3-0068c, April 15, 1996.

2. On November 19, 1997, Snohomish County Superior Court, in reviewing the Board's decision in *Sky Valley v. Snohomish County*, issued a "Judgment Affirming in Part and Remanding in Part," Superior Court Case No. 96-2-03675-5.
3. In an oral decision incorporated by the Court into the Judgment Affirming in Part and Remanding in Part, the Superior Court stated:

Evidence and arguments supporting de-designation were presented by [the City of Arlington] . . . focused almost exclusively on issues relating to the City of Arlington's economic growth and well-being, and not on Growth Management Act Criteria. . . . An isolated special purpose freeway service node does not constitute generalized urban growth . . . What happened to the fundamental axiom of the Growth Management Act that "the land speaks first"? Where does the Act state that the economic welfare of cities speaks first? Where does the evidence submitted by Arlington even reference the agricultural productivity or the floodplain status of the lands which are not proposed for automobile dealerships? Freeways are no longer longitudinal strips of urban opportunity. Agricultural lands must be conserved as a first priority, and urban centers must be compact, separate and distinct features of the remaining part of the landscape.

*Id.* Transcript of Proceedings, Court's Oral Ruling, at 14-18.

4. The Superior Court remanded the *Sky Valley* matter to the Board, finding no substantial evidence to support the removal of the agricultural designation. PDS Report, at 4.
5. Subsequent to the Superior Court remand, the Snohomish County Planning Commission and County Council reconsidered the land use designations for Island Crossing in 1998 and redesignated the agricultural areas as agricultural and redesignated the commercial area as Rural Freeway Service, and removed Island Crossing from the Arlington UGA.  
*Id.*
6. Dwayne Lane, the owner of 15 acres of land bordering Interstate 5 in Island Crossing, challenged the County's designation of Island Crossing as agricultural resource land and filed a petition for review with the Growth Management Hearings Board. The Board rejected Lane's appeal. CPSGMHB Case No. 98-3-0033c, *Lane, et al., v. Snohomish County*, Order Granting Motion to Dismiss [Lane]. Jan. 20, 1999.

7. Snohomish County Superior Court affirmed the Board's January 20, 1999 Order, after which Lane appealed to the Court of Appeals. *Lane v. Central Puget Sound Growth Management Hearings Board*, 2001 WL 244384 (Wash. App. Div. I, Mar. 12, 2001).
8. The Court of Appeals described the Island Crossing area as follows:

Island Crossing is composed of prime agricultural soils and has been described as having agricultural value of primary significance. Except for the County's 1995 dedesignation of Island Crossing as agricultural land, Island Crossing has been designated and zoned agricultural since 1978. Thus, the record supports a finding that Island Crossing is capable of being used for agricultural production. *See City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 53, 959 P.2d 1091 (1998).

Although Island Crossing borders the interchange of Interstate 5 and State Road 530, it is separated from Arlington by farmland. Indeed, the record contains evidence to indicate that most of the land in Island Crossing is being actively farmed, except a small area devote to freeway services. Thus, the record indicates that the land is actually used for agricultural production. *See City of Redmond*, 136 Wn.2d at 53. The only urban development permits issued for Island Crossing are for the area that serves the freeway. Further, the substantial shoreline development permit for sewer service in the freeway area explicitly 'prohibits any service tie-ins outside the Freeway Service Area.' Thus, adequate public facilities and services do not currently exist.

*Id.*

#### **B. PROCEDURAL HISTORY OF CASE NO. 03-3-0019c**

On October 23, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (PFR) from 1000 Friends of Washington, Stillaguamish Flood Control District (**Stillaguamish**), Agriculture for Tomorrow, and Pilchuck Audubon Society (collectively, **Petitioners** or **1000 Friends**) and "Request for Expedited Review." Petitioners challenge the adoption by Snohomish County (the **County** or **Snohomish**) of Amended Ordinance No. 03-063.

The basis for the challenge is alleged noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**). The matter was assigned Case No. 03-3-0019 and is hereafter referred to as *1000 Friends, et al., v. Snohomish County*. Board member Joseph W. Tovar is the Presiding Officer for this matter.

On October 28, 2003, the Board issued the "Notice of Hearing" in this matter.

On November 5, 2003, the Board received "Snohomish County's Response to Petitioners' Request for Expedited Review." Also on this date, the Board received from Dwayne Lane a "Motion for Status as Intervenor" (the **Dwayne Lane Motion to Intervene**) in Case No. 03-3-0019 and a draft "Order Granting Motion for Status as Intervenor." Also on this date, the Board received a PFR from "The Director of the State of Washington Department of Community, Trade, and Economic Development" (the **DCTED II PFR**) challenging the adoption of Snohomish County Ordinances Nos. 03-063 and 03-104, together with a "Motion to Consolidate" (the **DCTED Motion to Consolidate**) with Cases Nos. 03-3-0017 and 03-3-0019. The DCTED II PFR case was assigned Case No. 03-3-0020 and the case was titled *CTED v. Snohomish County [II]*.

On November 6, 2003, beginning at 10:00 a.m., the Board conducted the prehearing conference in the training room on the 24<sup>th</sup> floor of the Bank of California Building, 900 Fourth Avenue in Seattle. At the prehearing conference, the presiding officer orally granted the portion of the DCTED Motion to Consolidate that includes issues addressed to Snohomish Ordinance No. 03-063. He indicated that the legal issues addressed to Snohomish Ordinance No. 104 would not be consolidated with Case No. 03-3-0019, but would be referred to Mr. McGuire, the presiding officer in Case No. 03-3-0017. The presiding officer also orally granted the motion by Dwayne Lane to intervene in the consolidated 1000 Friends and DCTED challenges to Snohomish Ordinance No. 03-063.

On November 10, 2003, the Board received "Snohomish County-Camano Association of Realtors and Master Builders Association of King and Snohomish Counties' Joint Opposition to CTED's Motion to Consolidate." The caption of this pleading listed both Case No. 03-3-0017 (CTED I) and Case No. 03-3-0020 (CTED II).

On November 12, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued "Prehearing Order, Order Partially Granting Motion for Consolidation, and Order Granting Motion for Intervention" (the **PHO**) in the above captioned matter. The PHO set the Final Schedule for the submittal of motions and briefs. PHO, at 4-5. Later on this same date, the Board received from Petitioner 1000 Friends a letter (the **1000 Friends letter**) attached to which were: (1) a City of Arlington Development Services "City Council Agenda Bill" with a Council Meeting Date of September 17, 2003 and the subject heading caption "Consideration of Intention of Annexation 10% Petition for Island Crossing Annexation (File No. A-03-068)" and (2) a memorandum, dated September 7, 2003, from Cliff Strong, Arlington Planning Manager to the Mayor and City Council.

On November 13, 2003, the Board received from the County a letter (the **County letter**) responding to the 1000 Friends letter.

On November 14, 2003, the Board received "Snohomish County's Index to the Record" (the **County's Index**). Later on this same date, the presiding officer directed Susannah Karlsson, the Board's Administrative Officer, to contact the parties to the case for the purpose of setting up a telephone conference call to hear oral argument regarding the

1000 Friends letter and the County letter on Tuesday, November 18, 2003 commencing at 9 a.m.

On November 18, 2003, the Board conducted a telephonic conference call to hear argument regarding the 1000 Friends letter and the County letter. Participating for the Board were Bruce C. Laing and Joseph W. Tovar, presiding officer. Participating for 1000 Friends was John T. Zilavy, for the County was Andrew S. Lane, for Stillaguamish were Henry Lippek and Ashley E. Evans, for Intervenor Dwayne Lane was Todd C. Nichols, and for the Washington State Department of Community, Trade and Economic Development was Alan D. Copsey.

On November 24, 2003, the Board issued "Order Granting Motion to Supplement the Record" (the **First Order on Motions**). The First Order Granting Supplementation admitted to the record before the Board two supplemental exhibits and assigned them exhibit numbers Supp. Ex. 1 and Supp. Ex. 2.

On December 4, 2003, the Board received "1000 Friends' Motion to Correct the Record and Index of Record" (the **1000 Friends Motion**) with proposed supplemental exhibits A, B, and C.

On December 5, 2003, the Board received "Flood Control District's Motion to Correct the Record and Index of the Record," (the **Stillaguamish Motion**) with proposed supplemental exhibits A and B.

On December 12, 2003, the Board received "Snohomish County's Response to Motions to Supplement the Record" (the **County Response**) with Attachments A, B and C. On this same date the Board received "Dwayne Lane's Memorandum in Opposition to Correct the Record and Index of Record" (the **Lane Memorandum**) together with the "Declaration of Dwayne Lane Re: Motions to Correct or Supplement the Record" (the **Lane Declaration**).

On December 18, 2003, the Board received "Petitioners' Reply to Motion to Correct the Record and Index of Record" (the **1000 Friends Reply**).

On December 19, 2003, the Board received "Flood District's Reply to Dwayne Lane and Snohomish County's Responses to Motion to Correct the Record and Index of Record" (the **Flood District Reply**).

On January 2, 2004, the Board issued "Second Order on Motions" (the **Second Order on Motions**).

On January 9, 2004, the Board received the "Petitioner Stillaguamish Flood Control District's Prehearing Brief" (the **Flood District PHB**) "1000 Friends of Washington Opening Brief" (the **1000 Friends' Opening Brief**); and "CTED's Opening Brief" (the **CTED Opening Brief**).

On January 23, 2004, the Board received "Snohomish County's Response Brief" (the **County Response**) and "Intervenor Lane's Hearing Response Memorandum" (the **Lane Response**) and "Intervenor Lane's Motion to Supplement the Record" (the **Lane January 23, 2004 Motion to Supplement**).

On January 29, 2004, the Board received "Flood District's Reply Brief" (the **Flood District Reply**), and "CTED's Reply Brief" (the **CTED Reply**).

On January 30, 2004, the Board received "1000 Friends of Washington, Agriculture for Tomorrow, and Pilchuck Audubon Society Reply Brief" (the **1000 Friends Reply**).

The Board conducted the Hearing on the Merits (the **HOM**) in this matter on February 2, 2004 in the conference room adjacent to the Board's office, Suite 2470, 900 Fourth Avenue in Seattle. Present for the Board were Edward G. McGuire, Bruce C. Laing, and Joseph W. Tovar, presiding officer. Also present were the Board's legal externs Ketil Freeman and Lara Heisler. Court reporting services were provided by Scott Kindle of Mills and Lessard, Seattle. The parties were represented as follows: for 1000 Friends was John T. Zilavy; for Stillaguamish Flood Control District were Henry Lippek and Ashley Evans; for CTED was Alan D. Copsey; for the County was Andrew S. Lane; and for Intervenor Dwayne Lane was Todd C. Nichols. No witnesses testified. At the conclusion of the HOM, the presiding officer directed that a transcript (the **HOM Transcript**) be prepared.

On February 11, 2004, the Board received a letter from counsel for the County indicating that "Snohomish County will not be submitting a post-hearing rebuttal to 1000 Friends' late reply brief."

On February 13, 2004, the Board received "Intervenor Lane's Surrebuttal Memorandum" (the **Lane Surrebuttal**).

On March 18, 2004, the Board received "1000 Friends of Washington, Agriculture for Tomorrow, and Pilchuck Audubon Society Motion to Supplement the Record" (the **1000 Friends March 18, 2004 Motion to Supplement**). Later on this same date, the Board received "Respondent Snohomish County's Response to 1000 Friends' Motion to Supplement the Record" (the **County Response to the 1000 Friends March 18, 2004 Motion to Supplement**).

On March 19, 2004, the presiding officer directed the Board's Administrative Officer Susannah Karlsson to contact the parties to ask if they wished to file any response to the 1000 Friends March 18, 2004 Motion to Supplement. She made telephone contact with all parties. Later on this same date, the Board received "Intervenor Dwayne Lane's Response to 1000 Friends' Motion to Supplement the Record" (the **Lane Response to the 1000 Friends March 18, 2004 Motion to Supplement**) and correspondence from counsel for the Stillaguamish Flood Control District (the **Flood District Letter**).

### III. FINDINGS OF FACT

1. The Snohomish County Council adopted Ordinance No. 03-063 on September 10, 2003. 1000 Friends PFR, Attachment 1.
2. The caption of Ordinance No. 03-063 reads: "REVISING THE EXISTING URBAN GROWTH AREA FOR THE CITY OF ARLINGTON; ADOPTING MAP AMENDMENTS TO THE GROWTH MANAGEMENT ACT COMPREHENSIVE PLAN; AND ADOPTING COUNTY-INITIATED AREA-WIDE REZONES PURSUANT TO CHAPTER 30.74 SCC; AND AMENDING AMENDED ORDINANCE 94-125, ORDINANCE 94-120, AND EMERGENCY ORDINANCE 01-047. *Id.*
3. Among the County Council's findings of fact and conclusions listed in Section 1 of Ordinance No. 03-063 are the following:

B. 6. Ragnar soils are the best soils for production of commercial crops and there are no Ragnar soils at Island Crossing. The Island Crossing area consists primarily of Puget soils that are adequate for hay, green chop and pasture, but are not suitable for more valuable crops like berries and corn. The Puget soils are considered "prime" only when artificially drained, which the land at the site is not, and even when drained the Puget series is considered low productivity.

B.7. Farming is no longer financially viable at Island Crossing. Busy highways, high assessed value, small parcel size and safety issues eliminate the viability of the Island Crossing interchange site as agricultural land.

B.8. Snohomish County is growing rapidly and it is inevitable that sites like Island Crossing will be converted from agricultural uses to commercial uses.

S. Approval of the Island Crossing Interchange Docket Proposal is not precedent for redesignation of Agricultural land in the Stillaguamish Valley. This proposal is approved entirely on its own merits. These include: (1) This proposal is supported by the Snohomish County Planning Commission. (2) Bringing this land into the Arlington Urban Growth Area is fully supported by the City of Arlington. (3) This proposal is supported by the Stillaguamish Tribe. (4) This land is located at an I-5 interchange between an interstate highway and a state highway, and is uniquely located for commercial needs of the area. (5) This land has unique access to utilities. Redesignation of adjacent properties to the east will not occur because utilities are unavailable to the east.

T. The land contained within the Island Crossing Interchange Docket Proposal is not agricultural land of long term commercial significance. . . At the public hearing, the testimony of Mrs. Robert Winter (Exh. 111) was very persuasive on this point. Since the mid-1950's, she and her husband had a dairy farm in the very location of the Island Crossing Interchange Docket Proposal site. Locating and then expanding I-5 put them out of the dairy business. They soon discovered that crops generated less revenue than the property taxes. The Winters sold the land because the land could not be profitably farmed.

U. The Island Crossing Interchange Docket Proposal site has episodically flooded in the past and will continue to episodically flood in the future, whether or not the proposal is approved, and whether or not the site is developed. The relevant question is not whether the proposal site experiences floods, but rather does the site experience significant adverse flood impacts which cannot be reasonably mitigated. The Draft Supplemental Environmental Impact Statement (Exh. 22) clearly states, at p. 2-24: "Assuming effective implementation of applicable regulations and recommended mitigation measures, no significant unavoidable adverse surface water quantity or quality impacts would be anticipated associated with the future development of the site." *Id.*

4. Section 6 of Ordinance No. 03-063 provides:

Severability. If any provision of this ordinance is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remainder of this ordinance. Provided, however, that if any provision of this ordinance is held invalid or unconstitutional, then the provision in effect prior to the effective date of this ordinance shall be in full force and effect for that individual provision as if this ordinance had never been adopted.

*Id.*

5. Snohomish County is 2,089 square miles. Washington State Data Book for 2003, Office of Financial Management, at 236.
6. The Snohomish County General Policy Plan designates approximately 3% of the County's total land area, or 60,000 acres, as GMA agricultural resource lands. <http://www.co.snohomish.wa.us/PDS/900-Planning/Resource/default.asp>
7. With the exception of the cities of Stanwood and Arlington, the floodplain of the main fork of the Stillaguamish River is designated on the County's Future Land Use Map as Agricultural Resource Land. Snohomish County General Policy Plan, FLUM, online at <http://www.co.snohomish.wa.us/pds/905-GIS/maps/flu/flu117.pdf>.
8. The Island Crossing area is located within the floodplain of the Stillaguamish River. Planning and Development Services (PDS) Report, at 10.

9. The Stillaguamish River basin suffers from damaging floods on average every three to five years according to the Federal Emergency Management Agency. PDS Report, at 11.
10. The 110.5 acre area subject to Ordinance No. 03-063 is configured as a multi-sided polygon with two roughly mile-long sides that follow north-south right-of-way lines, two smaller but *parallel* east-west sides that do not follow right-of-way lines, and a number of other smaller sides that follow jogs in right-of-way or property lines. DEIS, Figure 1-2, scale map of "Proposed Comprehensive Plan Amendment – Dwayne Lane."
11. The two long sides of the 110.5 acre shape are (a) the western side which coincides with the western edge of the Interstate 5 right-of way for approximately 5,900 linear feet; and (b) the eastern side of approximately 5,000 linear feet, of which roughly the southerly 4,300 feet coincide with the eastern edge of the Smokey Point Boulevard right-of-way. The two parallel sides of this shape are (a) the northerly edge which is approximately 2,700 linear feet and coincides with the northern edge of parcels which front onto S.R. 530; and (b) the southern side, which is roughly 450 linear feet long, and lies entirely within public right-of-way. *Id.*
12. The southerly 700 feet of the 110.5 acre shape (*i.e.*, that portion which lies south of 200<sup>th</sup> Street NE, if extended) is entirely within either Interstate 5 right-of-way or Smokey Point Boulevard right-of-way. *Id.*
13. The City of Arlington city limits abut the southern edge of the 110.5 acre shape.
14. The closest point of contact between Arlington's city limits and private property within the 110.5 acre shape is approximately 700 feet. *Id.*
15. Prior to the adoption of Ordinance No. 03-063, the 35.5 acre northwest portion of the 110.5 acre area was designated on the County's Future Land Use Map (FLUM) as Rural Freeway Service and zoned Rural Freeway Service (RFS). DSEIS, at i.
16. Prior to the adoption of Ordinance No. 03-063, the 75.5 acre eastern portion of the 110.5 acre area was designated on the FLUM as Riverway Commercial Farmland and zoned Agricultural-10. *Id.*
17. The Island Crossing Area is designated floodway fringe by the County's flood hazard regulations. PDS Report, at 14.
18. In letters dated February 21, 2003 and February 26, 2003, the Snohomish County Agricultural Advisory Board recommended that the County not remove the agricultural land use designations at Island Crossing. Index of Record 25.
19. The Agricultural Advisory Board stated its reasoning as:
  - 1) The land lies in the Stillaguamish floodplain, at or below the 100-year flood level. Photographs demonstrate it is completely inundated

during major flood events, much of it under several feet of water. It is bisected by a floodway (South Slough) and bordered by a 303d-listed, year-round salmon stream (Portage creek), into which the area drains.

- 2) The land is comprised of prime agricultural soil, well drained and highly fertile. Currently and historically farmed, it has long been identified by the County as “agricultural land of primary importance.”
- 3) All adjacent lands, except a small, freeway service zone, are predominantly agricultural in use and indisputably non-urban in character. The existing “development pattern,” cited as a hindrance to farming in the request itself, would be dwarfed by the one it proposes, with proportionate adverse impact.

*Id.*

#### IV. STANDARD OF REVIEW/BURDEN OF PROOF/DEFERENCE

##### A. Board Review of Local Government Decisions

Petitioners challenge the County’s adoption of Ordinance No. 03-063 alleging that the Ordinance does not comply with the goals and requirements of the Growth Management Act. Pursuant to RCW 36.70A.320(1), Ordinance No. 03-063, is presumed valid upon adoption by the County. Petitioners bear the **burden of proof** of overcoming the County’s **presumption of validity** by presenting evidence and argument that demonstrates clear error.

The Board is directed by RCW 36.70A.320(3) to review the challenged action using the “**clearly erroneous**” **standard of review**. The Board “shall find compliance unless it determines that the actions taken by [a city or county] are clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” For the Board to find the County’s actions clearly erroneous, the Board must be “left with the firm and definite conviction that a mistake has been made.” *Dep’t of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Pursuant to RCW 36.70A.3201, the Board will grant **deference** to the County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. In 2000, the State Supreme Court reviewed RCW 36.70A.3201 and clarified that, “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000).

In 2001, Division II of the Court of Appeals further clarified, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not ‘consistent with the requirements and goals of the GMA.’” *Cooper Point Association v. Thurston County (Cooper Point)*, No. 26425-1-II, 108 Wn. App. 429, 31 P.3d 28 (Wn.App. Div. II, 2001).

In 2002, the Supreme Court upheld the *Cooper Point* court. *Thurston County v. Western Washington Growth Management Hearing Board*, Docket No. 71746-0, November 21, 2002, at 7.

## B. Judicial Review of Board Decisions

Any party aggrieved by a final decision by a growth management hearings board may appeal the decision to superior court as provided in RCW 34.05.514 or 36.01.050 within thirty days of the final order of the Board. RCW 36.70A.300(5).

RCW 36.70A.260(1) requires that board members be “qualified by experience or training in matters pertaining to land use planning.” The Board has been endowed by the legislature with quasi-judicial functions due to its expertise in land use planning.<sup>2</sup> Accordingly, under the Administrative Procedures Act, a reviewing court accords substantial weight to this agency’s interpretation of the law. The Supreme Court, in *Cooper Point*, specifically affirmed this standard of review of a Growth Management Hearings Board decision:

Although we review questions of law *de novo*, we give substantial weight to the Board’s interpretation of the statute it administers. *See Redmond*, 136 Wn.2d at 46. Indeed “[I]t is well settled that deference [to the Board] is appropriate where an administrative agency’s construction of statutes is within the agency’s field of expertise . . .

*Id.*

## V. MISCELLANEOUS MOTIONS

### A. MOTION TO STRIKE PORTION OF FLOOD DISTRICT BRIEF

At the hearing on the merits, the presiding officer orally granted the County Motion to Strike a portion of the Flood District PHB. Transcript, at 5-7. The County Motion to Strike a Portion of the Flood District Brief is **granted**. The Board will not consider the portions of the Flood District PHB from line 18 on page 24 through line 5 on page 27.

### B. MOTION TO STRIKE 1000 FRIENDS REPLY BRIEF

At the hearing on the merits, the presiding officer orally denied the Motion to Strike 1000 Friends Reply Brief; however, he provided the County and Intervenor with an opportunity to file a post-hearing brief responsive to the 1000 Friends Reply Brief. Transcript, at 8-15. The Motion to Strike 1000 Friends Reply Brief is **denied**.

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<sup>2</sup> The Board members possess the expertise required by RCW 36.70A.260(1). Vitae for Central Puget Sound Board members are posted on the Board’s website at [www.gmhb.wa.gov/central/index.html](http://www.gmhb.wa.gov/central/index.html).

### C. LANE JANUARY 23, 2004 MOTION TO SUPPLEMENT

In the Second Order on Motions, which admitted certain supplemental exhibits by Petitioners, the Board stated that Intervenor Lane would be allowed to submit rebuttal evidence. Second Order on Motions, at 9. Attached to Intervenor Lane's January 23, 2004 Motion to Supplement the Record were three proposed supplemental exhibits: "A" which consists of a series of date and time stamped photographs of Island Crossing properties showing its status throughout the day of October 21, 2004; Exhibit B which is a map labeled "Island Crossing Annexation Exhibit" which identifies the location and direction of a photo which is attached as proposed Exhibit C. Petitioner Lane presents argument addressed to the criteria governing the admission of supplemental evidence. Intervenor Lane Motion to Supplement the Record, at 2.

The Board finds that proposed supplemental exhibits "A," "B," and "C" may be of assistance in reaching a decision regarding aspects of the present matter, therefore Intervenor's proposed exhibits are **admitted** as Supplemental Exhibits 5, 6, and 7, respectively.

### D. 1000 FRIENDS MARCH 18, 2004 MOTION TO SUPPLEMENT

The 1000 Friends March 18, 2004 Motion to Supplement the record before the Board asks the Board to admit two proposed exhibits. The first is a letter dated March 4, 2004 from the Clerk of the Washington State Boundary Review Board for Snohomish County, the second is an agenda for a City of Arlington special meeting on March 23, 2004. The March 19, 2004 letter from counsel for the Flood Control District supports the 1000 Friends Motion.

Respondent Snohomish County objects to the motion to supplement with these two proposed exhibits. The County argues "Petitioner's motion should be denied outright, because petitioner has failed to follow the Board's rules. 'No written motion may be filed after the date specified in the [prehearing] order without written permission of the board or presiding officer.'" County Response to the 1000 Friends March 18, 2004 Motion to Supplement, at 2, quoting WAC 242-02-532(2). The County also argues that the proposed supplemental evidence will not be of substantial assistance to the Board and points out that Petitioner made no attempt to relate these items to any issue before the Board. *Id.*, at 3. Intervenor Lane agrees with the County's arguments. Lane Response to the 1000 Friends March 18, 2004 Motion to Supplement, at 1.

The Board agrees with the County and Intervenor that Petitioner 1000 Friends failed to comply with the provisions of the Board's Rules and the Prehearing Order by submitting a Motion to Supplement without first submitting a written request for leave to file such pleading. Pursuant to the provisions of WAC 242-02-532(2), the 1000 Friends March 18, 2004 Motion to Supplement is **denied**.

## **VI. BOARD JURISDICTION AND PREFATORY NOTE**

### **A. BOARD JURISDICTION**

The Board finds that Petitioners' PFRs were timely filed, pursuant to RCW 36.70A.290(2); all three Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged Ordinance, pursuant to RCW 36.70A.280(1)(a).

### **B. PREFATORY NOTE**

The Board has organized its discussion and analysis of the five legal issues as follows: first, the Board addresses the allegations regarding the County's redesignation of agricultural resource lands (Legal Issue No. 2); then allegations regarding expansion of the Urban Growth Area (Legal Issues Nos. 1 and 4); then allegations regarding Critical Areas (Legal Issue No. 5). Although the parties briefed the question of invalidity as a legal issue (Legal Issue No. 3), it is addressed in Section VIII titled "Invalidity."

## **VII. LEGAL ISSUES**

### **A. REDESIGNATION OF AGRICULTURAL RESOURCE LAND**

#### **Legal Issue No. 2**

*Does the Snohomish County adoption of Amended Ordinance No. 03-063, redesignating 110.5 acres from Riverway Commercial Farmland and Rural Freeway Service to Urban Commercial, fail to comply with RCW 36.70A.020(2) and (8) (planning goals to reduce sprawl and conserve natural resource lands), RCW 36.70A.040 (local governments must adopt development regulations that preserve agricultural lands), RCW 36.70A.050 (classification of agricultural lands), and RCW 36.70A.060 (conservation of agricultural lands), and RCW 36.70A.170 (designation of agricultural lands) when this redesignation lacks justification in the record and fails to enhance, protect or conserve agricultural lands of long term commercial significance as required by the Growth Management Act?*

#### **1. Applicable Law**

##### **A. Statutory Provisions**

RCW 36.70A.020 provides in relevant part:

The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

.....  
(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

RCW 36.70A.040 provides in relevant part:

(1) Each county that has both a population of fifty thousand or more . . . shall conform with all of the requirements of this chapter.

.....  
(3) Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a county-wide planning policy under RCW 36.70A.210; (b) the county and each city located within the county shall designate critical areas, agricultural lands, forest lands, and mineral resource lands, and adopt development regulations conserving these designated agricultural lands, forest lands, and mineral resource lands and protecting these designated critical areas, under RCW 36.70A.170 and 36.70A.060; (c) the county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; (d) if the county has a population of fifty thousand or more, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan on or before July 1, 1994, . . .

Emphasis added.

RCW 36.70A.050 provides in relevant part:

(1) Subject to the definitions provided in RCW 36.70A.030, the department shall adopt guidelines, under chapter 34.05 RCW, no later than September 1, 1990, to guide the classification of: (a) Agricultural lands; (b) forest lands; (c) mineral resource lands; and (d) critical areas. The department shall consult with the department of agriculture regarding guidelines for agricultural lands, the department of natural resources regarding forest lands and mineral resource lands, and the department of ecology regarding critical areas.

.....  
(3) The guidelines under subsection (1) of this section shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington state. The intent of these guidelines is

to assist counties and cities in designating the classification of agricultural lands, forest lands, mineral resource lands, and critical areas under RCW 36.70A.170.

Emphasis added.

RCW 36.70A.060 provides in relevant part:

(1) Each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. . . .

Emphasis added.

RCW 36.70A.170 provides in relevant part:

(1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:

(a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for commercial production of food or other agricultural products;

Emphasis added.

“Long term commercial significance” is defined as “the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the land’s proximity to population areas, and the possibility of more intense uses of the land.” RCW 36.70A.030(10).

#### **B. WAC 365-190-050**

The Department of Community, Trade, and Economic Development was directed by RCW 36.70A.050 to adopt guidelines to guide the classification of agricultural lands. These provide:

(1) In classifying agricultural lands of long-term significance for the production of food or other agricultural products, counties and cities shall use the land-capability classification system of the United States Department of Agriculture Soil Conservation Service [SCS] as defined in Agricultural Handbook No. 210. These eight classes are incorporated by the United States Department of Agriculture [USDA] into map units described in published soil surveys. These categories incorporate consideration of the growing capacity, productivity and soil composition of the land. Counties and cities shall also consider

the combined effects of proximity to population areas and the possibility of more intense uses of the land as indicated by:

- a. The availability of public facilities;
- b. Tax status;
- c. The availability of public services;
- d. Relationship or proximity to urban growth areas;
- e. Predominant parcel size;
- f. Land use settlement patterns and their compatibility with agricultural practices;
- g. Intensity of nearby land uses;
- h. History of land development permits issued nearby;
- i. Land values under alternative uses; and
- j. Proximity to markets.

- (2) In defining categories of agricultural lands of long-term commercial significance for agricultural production, counties and cities should consider using the classification of prime and unique farmland soils as mapped by the Soil Conservation Service. If a county or city chooses to not use these categories, the rationale for that decision must be included in its next annual report to the department of community development.

WAC 365-190-050.

### C. WASHINGTON SUPREME COURT CASE LAW

In a 1998 case, *Redmond v. Central Puget Sound Growth Management Hearings Board (Redmond)*, 136 Wash. 2d 38 (1998), at 53, the State Supreme Court construed the statutory term "devoted to agricultural use": "We hold land is 'devoted to' agricultural use under RCW 36.70A.030 if it is an area where the *land is actually used or capable of being used* for agricultural production." (Emphasis supplied.) The Court also stated, at 53:

[I]f land owner intent were the controlling factor, local jurisdictions would be powerless to preserve natural resource lands. Presumably in the case of agricultural land, it will always be financially more lucrative to develop such land for uses more intense than agriculture. Although some owners of agricultural land may wish to preserve it as such for personal reasons, most, . . . will seek to develop their land to maximize their return. If the designation of such land as agriculture depends on the intent of the landowner as to how he or she wishes to use it, the GMA is powerless to prevent the loss of natural resource land. All a land speculator would have to do is buy agricultural land, take it out of production, and ask the controlling jurisdiction to amend its comprehensive plan to remove the "agricultural land" designation

. . . One cannot credibly maintain that interpreting the definition of “agricultural land” in a way that allows the land owners to control its designation gives effect to the Legislature’s intent to maintain, enhance, and conserve such land . . . We decline to interpret the GMA definition in a way that vitiates the stated intent of the statute.

In 2000, the Supreme Court further clarified that the GMA “evidences a legislative mandate for the conservation of agricultural land . . .” in *King County v. Central Puget Sound Growth Management Hearings Board [King County]*, 142 Wn.2d 543, 558, 14 P.3d 133 (2000). The Court also stated:

In summary, the agricultural lands provisions (RCW 36.70A.020(8), .060, and .170) direct counties and cities (1) to designate agricultural lands of long-term commercial significance; (2) to assure the conservation of agricultural land; (3) to assure that the use of adjacent lands does not interfere with their continued use for agricultural purposes; (4) to conserve agricultural land in order to maintain and enhance the agricultural industry; and (5) to discourage incompatible uses...

Although the planning goals are not listed in any priority order in the Act, the verbs of the agricultural provisions mandate specific, direct action. The County has a duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural lands to assure the maintenance and enhancement of the agricultural industry.

## **2. Discussion**

### Positions of the Parties

#### 1. Petitioners

Petitioners contend that the County’s redesignation of 110.5 acres of land from Riverway Commercial Farmland and Rural Freeway Service to Urban Commercial lacks

justification in the record and fails to protect agricultural lands of long-term commercial significance.

1000 Friends asserts that the issues raised in *1000 Friends of Washington v. Snohomish County*, CPSGMHB Case No. 03-3-00019c, relating to the redesignation of agricultural land are substantially similar to those issues already addressed by the Board in *Hensley VI*. In that case, the Board determined that Snohomish County's action was clearly erroneous when it concluded that land in question no longer met the criteria for designation as agricultural land of long-term commercial significance.

1000 Friends argues that Mrs. Roberta Winter's testimony did not provide a basis for the County to de-designate the resource land at Island Crossing. 1000 Friends' Opening Brief, at 23. At the public hearing, Mrs. Winter opined that the land was not good crop land. Partial Transcript Snohomish County Ag Board Meeting 02/06/03, at 3-4. She stated that she and her husband operated a dairy farm in the very location of the Island Crossing Interchange Docket Proposal site. *Id.* 1000 Friends states that it is apparent from the transcript that the Winters were dairy farmers, and it is unclear if they ever attempted to raise crops on their land. *Id.* 1000 Friends further points out that Ms. Winter's testimony was contradicted by statements of farmers on the Snohomish County Agricultural Advisory Committee who said they could farm Mr. Lane's land today. 1000 Friends Opening Brief, at 23.

1000 Friends provides supporting evidence that Island Crossing is being used in support of agricultural production by the pea farmers in the Stillaguamish valley. They point to record evidence from a local pea processing company stating that this land can be farmed for commercial agricultural crops. *Index of Record No. 101, Letter from Roger O. Lervick, Twin City Foods, Inc. July 9, 2003.* That testimony provides:

[w]e currently contract with local growers in the Stillaguamish and Skagit valleys to raise peas for our plant in Stanwood. We have raised anywhere from 5000 acres to 10,000 acres of peas in this local area and we currently contract a portion of those acres in the Island Crossing area and have found it ideal for raising peas.

*Id.*, at 23.

1000 Friends points out that the County's PDS conducted an analysis of the Dwayne Lane proposal. *Index of Record No. 21.* The PDS Report recommended that the County deny Dwayne Lane's requested redesignation and rezone. *Index of Record No. 21, PDS Report*, at 2-3 and 14.

In addition, the PDS Report states:

Discussion: Analysis of the proposal conducted by PDS conclude that under the GMA's minimum guidelines for classification of agricultural lands, the portion of the proposal site currently designated and zoned for

agricultural uses should continue to be classified as such. This conclusion is based on the following analysis of the GMA guidelines:

Availability of Public Facilities: Public water and sanitary sewer facilities are physically located in and adjacent to the proposal site. However, sanitary sewer service is restricted by the GPP to Urban Growth Area. The shoreline substantial development permit for the existing sewer line restricts availability of sanitary sewer to the existing parcels zoned Rural Free Way Service.

Tax Status: Several large parcels in the area (approximately 32% of the area) are classified as Farm and Agricultural Land by the Snohomish County Assessor and are valued at their current use rather than "highest and best use." The other parcels in the area, however, are valued and taxed at their "highest and best use."

Availability of Public Services: Public services such as public water and sanitary sewer service physically located within and adjacent to the proposed site. However, sanitary sewer service is restricted by the GPP to UGAs. The existing sanitary sewer line is available by conditions in the shoreline substantial development permit to existing parcels zoned Rural Freeway Service.

Relationship or proximity to urban growth areas: The proposal site is approximately 0.9 miles from the Arlington city limits and is functionally separated from the City because it is within the Stillaguamish River floodplain. The southern tip of the proposal site is adjacent to the Arlington UGA.

Land Use Settlement Patterns and Compatibility with Agricultural Practices: Most of the proposal site is currently in farm use with interspersed residential and farm buildings.

Predominant Parcel Size: Predominant parcel sizes are large and of a size typically in areas designated as commercial farmland. Nine parcels are located within the 75.5 acres of the proposal site designated Riverway Commercial Farmland. Approximate sizes of these parcels are 20.7 acres, 15.8 acres, 2.9 acres and three smaller parcels.

Intensity of Nearby Uses: More intense land uses and urban land developments are located within the Rural Freeway Commercial node at the I-5/SR interchange that has existed essentially in its present configuration since 1968. Farmland is located immediately to the east, and, separated by I-5 to the west.

History of Land Development Permits Issued Nearby: No urban development permits have been issued in the vicinity of the proposal site except for the substantial shoreline development permit issued for the sewer line that serves only freeway commercial uses.

Land Values Under Alternative Uses: The area of the proposal site outside of Rural Freeway Service designation is in the floodway fringe area of the Stillaguamish River. Higher uses than farming would be difficult to locate in the area because of the floodplain constraints.

Proximity to Markets: Markets within Arlington, Marysville, and Stanwood are located in close proximity to the site.

1000 Friends Opening Brief, at 28-29, quoting PDS Report, at 5-6.

1000 Friends asserts that the evidence in the County's record supports maintaining agricultural designation for the land. Petitioners point out that the above text is supported in the DSEIS at 2-32 to 2-33. They also point out that the DSEIS concluded the Dwayne Lane site (except the northwest portion designated Rural Freeway Service) is properly designated agricultural and that removal of that designation would conflict with the statutory duties of the GMA. DSEIS, at 2-36. "Most of the proposed site is currently in farm use with interspersed residential and farm buildings." Index of the Record No. 22, DSEIS, at 2-33.

CTED agrees with 1000 Friends arguments concerning redesignation of agricultural resource lands. It observes that in a prior case:

[The Board explained that when UGA expansions are challenged, the record must provide support for the actions the jurisdiction has taken; "otherwise the action may be determined to have been taken in error - *i.e.*, clearly erroneous;" accordingly, counties must "show their work" when a UGA is expanded. The work they must show is the completion of a valid land capacity analysis, and any expansion of a UGA must be supported by that land capacity analysis.

CTED'S Opening Brief, at 21, quoting *Kitsap Citizens*,<sup>3</sup> at 13.

Petitioners 1000 Friends and Stillaguamish Flood Control District requested that the Board enter a finding of invalidity for Ordinance No. 03-063. 1000 Friends PFR, at 5. Petitioner CTED did not join in the request for Invalidity.

In addition, CTED asserts Ordinance 03-063 fails to comply with RCW 36.70A.060, RCW 36.70A.170, and RCW 36.70A.020(8) when the ordinance re-designates agricultural lands in the Island Crossing area for urban commercial development, and

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<sup>3</sup>*Kitsap Citizens for Rural Preservation v. Kitsap County (Kitsap Citizens)*, CPSGMHB Case No. 00-3-0019c, Final Decision and Order, May 29, 2001.

places them into the Arlington UGA, even though the agricultural lands continue to meet the statutory criteria for designation. CTED'S Opening Brief, at 30. CTED cites Board precedent regarding local governments' duties under the GMA to conserve agricultural lands:

In *Green Valley, et al., v. King County* (No. 98-3-0008c), this Board characterized the GMA's several agricultural lands provisions as creating an "agricultural conservation imperative that imposes an affirmative duty on local governments to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural resource industry."

*Id.*, at 31.

CTED points out that the Board's *Green Valley* decision was affirmed by the State Supreme Court, as follows:

In summary, the agricultural lands provisions (RCW 36.70A.020(8), .060, and .170) direct counties and cities (1) to designate agricultural lands of long-term commercial significance; (2) to assure the conservation of agricultural land; (3) to assure that the use of adjacent lands does not interfere with their continued use for agricultural purposes; (4) to conserve agricultural land in order to maintain and enhance the agricultural industry; and (5) to discourage incompatible uses ...

Although the planning goals are not listed in any priority order in the Act, the verbs of the agricultural provisions mandate specific, direct action. The County has a duty to designate and conserve agricultural lands to assure the *maintenance* and enhancement of the agricultural lands to assure the maintenance and enhancement of the agricultural industry."

*Id.*, at 32, quoting the Supreme Court's language in *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 558, 14 P.3d 133 (2000).

To support its assertion that landowner intent is not the controlling factor in determining the long-term commercial significance of agricultural resource lands, CTED cites the initial Supreme Court case that addressed the GMA's agricultural resource lands provisions:

[T]here are compelling reasons against concluding the Legislature intended current use or land owner intent to control the designation of natural resource lands under the GMA. First, if current use were a criterion, GMA comprehensive plans would not be plans at all, but mere inventories of current land use. The GMA goal of maintaining and enhancing natural resource lands would have no force; it would be subordinate to each individual land owner's current use of the land ...

Second, if land owner intent were the controlling factor, local jurisdictions would be powerless to preserve natural resource lands...All a land speculator would have to do is by agricultural land, take it out of production, and ask the controlling jurisdiction to amend its comprehensive plan to remove the "agricultural land" designation...[T]he controlling jurisdiction would have no choice but to do so, because the land is no longer being used for agricultural purposes.

*Id.*, at 33, quoting *Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 52-53, 959 P.2d 1091 (1998).

CTED asserts the agricultural lands in the Island Crossing area continue to qualify for designation as agricultural lands of long-term commercial significance under the GMA. *Id.* CTED cites to the DSEIS, at 2-26, to describe the consequences that the adoption of Ordinance No. 03-063 would have for the agricultural lands in the Island Crossing area as well as abutting agricultural lands in the Stillaguamish Valley:

Approval of the Comprehensive Plan Amendment and concurrent rezone to General Commercial would result in new development on portions of the subject site that are currently undeveloped or in agricultural use. This analysis assumes that existing freeway service uses would remain in place and new development would replace existing agricultural and single-family residential uses....

#### Compatibility of Use and Intensity

Future commercial development on the subject site would occur at intensities significantly greater than existing conditions and would increase activity levels in the area. This development would be compatible with existing commercial uses located within the site and to the west of I-5. I-5 would provide a barrier to the west between the potential commercial development and existing agricultural lands. However, because of the intensity of proposed commercial uses, this development would be incompatible with agricultural uses located to the north and east of the site.

#### Cumulative Impacts

In conjunction with other proposed development in Snohomish County the Proposed Action would contribute to cumulative increases in county land converted from agricultural to commercial uses. This growth would continue to increase the local demand for public facilities and services.

*Id.*, at 34-35.

CTED agrees with 1000 Friends that the DSEIS concluded that the lands in Island Crossing designated for agriculture prior to the adoption of Ordinance 03-0063 continued to meet the statutory criteria for designation as agricultural lands of long term commercial significance. In addition, CTED points to the DSEIS:

*The County's records establish that the Dwayne Lane site (except for the northwest portion designated Rural Freeway Service) is properly designated agricultural and that removal of that designation would conflict with the statutory duties of the GMA. Also, the removal of the Riverway Commercial Farmland designation does not meet the criteria in the County's GPP for redesignation of agricultural land and would be inconsistent with recent cases regarding agricultural land redesignation before the Central Puget Sound Hearings Board and the Washington State Supreme Court. When the Snohomish County Council considered the designation of the site in 1998, it concluded that the site met the criteria for designation as agricultural land of long-term significance as defined in the GPP and met the State's minimum guidelines for classification as agricultural lands under GMA. Circumstances have not changed since this Council decision in 1998.*

*Id.*, at 37. Emphasis by CTED.

CTED also provides that the "Staff Report recommended that the County Council reject the proposed ordinance, based in part on the following summary conclusion related to agricultural designation:

1. The proposal by Dwayne Lane to expand the Arlington UGA and amend the GPP's FLUM to redesignate 110.5 acres from Rural Freeway Service and Riverway Commercial Farmland to Urban Commercial is not consistent with the policies under Goal LU7 in the GPP to conserve agricultural land. *The proposal site is composed of prime agricultural soils and meets all of the criteria in the GPP under Implementation Measure LU 7a for continued designation as agricultural land of long-term significance as defined by the GPP.*

*Additionally, consideration of the state's minimum guidelines in the Washington Administrative Code (WAC) indicates that the Dwayne Lane site should continue to be classified as agricultural lands under the GMA.*

*Id.*, at 37-38, quoting PDS Report, at 14, emphasis by CTED.

## 2. Respondent and Intervenor

Snohomish County asserts that Petitioners' arguments ignored considering the land's proximity to population areas and the possibility of more intense uses of land when determining whether land is of long-term commercial significance. Snohomish County's Response Brief, at 12. Snohomish listed the ten CTED guidelines and acknowledged

them as the specific indicators to assist jurisdictions in considering the effects of proximity to population areas and the possibility of more intense uses of land. *Id.*, at 13. Snohomish provides as evidentiary support the text from the County Council's findings of fact and conclusions in the signed and passed Amended Ordinance 03-063. *Id.*, at 14-15. It did not provide the results from the PDS Report and DSEIS.

Snohomish asserts that the County Council considered the recommendations of the Planning Commission; the County Planning staff; the guidelines in the GMA and CTED; and reviewed all public testimony and comments before making its decision. Snohomish Response Brief, at 14.

Intervenor Lane contends that the land in Island Crossing is urbanized in nature, does not meet the standards to classify it as agricultural, and is properly designated urbanized and properly placed in Arlington's UGA. Lane Response, at 7. Lane claims that the "110.5 acre site already contains several businesses and public utilities services," and that the "land is approximately 4000 feet from the Arlington city limits and actually abuts the Arlington UGA on the South." *Id.*, at 8. Intervenor also argues that Island Crossing has an "urbanized character of land under the GMA" because of the "existing water/sewer line." *Id.*

In reviewing the guidelines from WAC 365-190-050, Lane argues the land is not devoted to agriculture because: 1.) the parcel owned by Lane has not been actively farmed on a commercially productive basis for nearly thirty years; 2.) evidence of the record shows that small-scale farms have not been commercially successful in the area for a number of years; 3.) due to the heavy use of roads surrounding the property, farming the land is not only unproductive, it is hazardous; and 4.) Mrs. Winter actually wanted to farm the land but could not. *Id.*, at 12. In addition, Intervenor asserts that, while landowner intent is not the controlling factor in determining whether land is devoted to agriculture or not, however land owner intent is to be considered along with other factors in making a proper designation. *Id.*, at 13.

Lane states the land use settlement patterns and their compatibility with agricultural practices do not support an agricultural determination. *Id.*, at 16. "A portion of the Island Crossing area is already developed as Freeway Service. It is made up of approximately 35 acres and contains three gas stations, three restaurants, a motel, and espresso stand, hay harvesting and two single-family homes. In addition, roadside services are operated by the Stillaguamish Tribe on a 2.5 acre triangular parcel at the Smokey Point Boulevard and State Route 530 intersection." *Id.*, at 15.

Intervenor asserts that the staff recommendation was dated February 24, 2003, and the "inquiry made by the staff to determine designation was made under the auspices of this Board's holding that in order to show an agricultural parcel be de-designated from agricultural land, the evidence must show "demonstrable and conclusive evidence the Act's definitions and criteria for designation" are no longer met. *Id.*, at 18. Lane argues that the staff believed the applicant must "present demonstrable and conclusive evidence of changed circumstances to justify it de-designation." *Id.* However, Lane states the

Court of Appeals clarified the standard utilized by the Board and that the county staff did not have the benefit of that guidance. *Id.* Intervenor also states that after the PDS report, hearings were held before the council on July 9, 2003, which included testimony and other evidence which now comprise the complete record before the Council. *Id.*, at 19.

Lane attacks the PDS report/discussion regarding the application of the GMA guidelines contains as inconsistent and inaccurate. *Id.*, at 19. Lane asserts the following:

For the availability of public facilities, the report concludes that sewer service is limited by shoreline issues and permitting limitations, which is contrary to the statutory mandate that permitting issues are not to be utilized for planning decisions (RCW 36.70A.470(1)(a)). *Id.*

For tax status, the PDS report admits that only 32% of the land is taxed as agricultural, and that under the current configuration, not even a majority of the land is carried as agricultural land. *Id.*, at 19

For land use settlement patterns and compatibility with agricultural practices, the PDS report finds “most” of the area is in current farm use, yet the report shows less than half (32%) of the property is taxed as agricultural land. The report fails to note the adverse impact traffic patterns have on any farming activities.

For history of land development permits issued nearby, the record shows that over 200 homes have been constructed on nearby property over the last ten years (see index #127 CPSGMHB, items 23 and 67 in HBA packet.)

For sewer service boundary, the property has a portion of land which has been included in sewer service boundaries pursuant to agreement between the Cities of Marysville and Arlington.

*Id.*, at 19-23.

#### Analysis

As this Board has previously observed, there are two requirements in the designation, or de-designation, of agricultural lands under the Growth Management Act. “The first is the requirement that the land be “devoted to” agricultural usage. The second is that the land must have ‘long-term commercial significance’ for agriculture.” *Hensley VI*, at 36.<sup>4</sup>

#### 1. Are the 75.5 Acres at Island Crossing “devoted to” agriculture”?

The Board answers this question in the affirmative. A plain reading of the Supreme Court’s holdings suggests that if land has ever been *used for agriculture* or is *capable of*

<sup>4</sup> *Hensley, et al., v. Snohomish County (Hensley VI)*, CPSGMHB Case No. 03-0-0009c, Final Decision and Order, Sep. 22, 2003.

being used for agriculture, it meets the “devoted to” prong of the test. *Redmond v. Central Puget Sound Growth Management Hearings Board (Redmond)*, 136 Wash. 2d 38 (1998), at 53. There does not appear to be a dispute regarding whether the 75.5 acres at Island Crossing have ever been farmed, so the Board arguably could end that part of its inquiry here. However, because the County focuses much of its argument on the contention that soils conditions somehow preclude agricultural use at Island Crossing, the Board will proceed.

Here, Petitioners have made a *prima facie* case supporting the assertion that there have been no changes to the soil condition, nor any changed circumstances that could support the County’s revision of the 75.5 acres from agricultural resource lands to non-agricultural resource lands commercial uses. Petitioners rely upon Board and Court case law, evidence in the record (regarding soil classification systems and long-term commercial significance) to undercut the County’s assertion that its action is supported by the record.

For example, Petitioner CTED disputes the “Finding No. 7” of Ordinance No. 03-063 that “Farming is no longer financially viable at Island Crossing.” CTED argues: “Related to finding number 7, the ordinance also includes a finding based on testimony received from a landowner in the Island Crossing area who testified the land could not be profitably farmed . . . None of these findings justifies the dedesignation of agricultural lands in the Island Crossing area.” CTED PHB, at 38.

CTED cites federal soils information to overcome the County’s assertion that the Puget soils found at Island Crossing are not “prime.” Petitioner asserts that whether or not Ragnar soils are the “best” soils for agricultural production is not the proper analysis since: “Logically, only one soil type could be the ‘best.’ The appropriate analysis is to examine soil types by reference to growing capacity, productivity, and soil composition.” *Id.* In order to compare the Ragnar soils that the County identifies as the “best” with the Puget soils that predominate at Island Crossing, CTED cites information from the U.S. Department of Agriculture, Natural Resource Conservation Service classifying Snohomish County soils.

From a review of the information contained in a table derived from that federal website,<sup>5</sup> the Board agrees with CTED’s contention that “Neither soil type is uniformly superior to the other. Both soils types are considered ‘prime agricultural soils.’” CTED PHB, at 39. For the County to conclude otherwise, and more fundamentally for the County to conclude that the Riverway Commercial Farmland acreage at Island Crossing was not “devoted to” agricultural use, was clear error.<sup>6</sup>

<sup>5</sup> Pursuant to WAC 242-02-670(2), the Board takes official notice of U.S. Department of Agriculture soils information on Snohomish County posted at [www.or.nrcs.usda.gov/pnw\\_soil/washington/wa661.html](http://www.or.nrcs.usda.gov/pnw_soil/washington/wa661.html).

<sup>6</sup> As the Board noted in a recent Snohomish County case:

The County did not alter its criteria for designating agricultural land to include *only those soils*, according to SCS soils capability criteria, *without constraints*, such as drainage limitations. Had the County done so, the necessity to “de-designate existing agricultural lands,” which no longer met its designation criteria, would have likely affected far more designated agricultural land than the . . . area affected by the

2. Do the 75.5 acres of land at Island Crossing have long-term commercial significance?

Again, the Board answers in the affirmative. The County relies upon its Finding T, set forth in Finding of Fact 3 *supra*, to support its conclusion that the Riverway Commercial Farmland no longer has long-term commercial significance. The "evidence" relied upon is testimony from an individual who operated a dairy farm in the vicinity fifty years ago who opined that she sold her farm "because the land could not be profitably farmed." Ex. 111. Anecdotal testimony, particularly from an individual whose direct experience with the area is decades removed from the present and whose declared expertise was in dairy rather than crop farming, does not constitute credible evidence on which to support the County's action. Also, as Petitioners noted, this "Finding" was contradicted by others with present-day experience in crop farming in the Stillaguamish Valley. 1000 Friends Opening Brief, at 23.

Further damaging to the credibility of the County's reasoning supporting its action is that nowhere do Respondent or Intervenor cite to credible, objective evidence to refute or reconcile the substantial record evidence (*i.e.*, the PDS report, the DSEIS, USDA soils survey) to the contrary. The Board acknowledges the County's assertion that the Council *considered* the contrary recommendations of the County Planning staff and Agriculture Advisory Board, as well as the guidelines in the GMA, CTED's procedural criteria, and reviewed all public testimony and comments before making its decision. Snohomish Response Brief, at 14. To the extent that there is no dispute that this evidence was placed before the Council before it took action adopting Ordinance No. 03-063, it can be said that the legislative body "considered" that evidence. However, the only record support cited by the County and Intervenor in support of dedesignation are far less credible than the substantial contrary evidence in this record.

As discussed, *supra*, County "Finding B.6" which asserts that "Puget Soils are not prime" is not supported by objective soils science, nor can the Board assign much weight to the dated, anecdotal testimony referenced in "Finding T." Even less weight can be accorded to the unsupported and conclusory statements of the County's "Finding B.7" [Farming is no longer financially viable] and "Finding B.8" [The County is growing rapidly and it is inevitable that sites like Island Crossing will be converted from agricultural uses to commercial uses.] These latter two findings are expressions of intent or opinion, rather than objective, scientifically respectable facts.

To the extent that the County and Intervenor rely upon the materials prepared by the consulting firm of Higa-Burkholder, the Board notes that this information was prepared at the behest of Mr. Dwayne Lane,<sup>7</sup> prime sponsor of the "Dwayne Lane Proposal for 2003 Final Docket Amendments." Mr. Lane is one of the property owners in the Island

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amendment. Instead, without amending its own agricultural land soils designation criteria, the County apparently decided that a new soil constraint criterion, regarding drainage, should be applied only to this area.

*Hensley VI*, at 37, footnote omitted.

<sup>7</sup>Counsel for Intervenor Lane stated that Mr. Burkholder, author of the HBA Report cited in support of the County's action, was retained by Mr. Lane. Transcript, at 70.

Crossing area and has specific interests and intentions relative to the land use of his property.<sup>8</sup> Therefore, the Board construes any record declarations or conclusions entered by Mr. Lane's consultants to be reflections, if not direct expressions, of "landowner intent" and assigns them the appropriate weight (*i.e.*, expressions of landowner intent, alone, are not determinative). As to the arguments presented in Intervenor's briefing, the Board is not persuaded that they provide support to the County's action de-designating agricultural resource lands and including Island Crossing in the UGA. Lane asserts that Island Crossing is "urbanized in nature" due to the existing improvements, including freeway service structures (Lane Response, at 16) and utility lines (Lane Response, at 7-8) nearby. The Board rejects this reasoning. We agree with Petitioners that the commercial uses presently in Island Crossing are, as the County has correctly designated them for years, "Freeway Service" uses, not urban uses. As to the proximity of utility service, the Board notes that their availability is in dispute, in view of permit and Shoreline Master Program restrictions. Even if there were no such restrictions, the mere presence of utility lines does not mandate urbanization.<sup>9</sup> As for the Intervenor's arguments regarding the Lane parcel having "not been actively farmed" for thirty years (Lane Response, at 12), the Supreme Court's language regarding "devoted to" makes no distinction about whether land was farmed thirty days or thirty years ago.

The Board also rejects the argument that off-site impacts of the County's action are limited. If the limited commercial freeway service uses now at Island Crossing create "hazardous" impacts for existing agricultural activities (Lane Response, at 13), how can those same impacts on surrounding areas be any less from the panoply of urban uses allowed in the County's "General Commercial" zone? A review of the geometry and topography of this area (Findings of Fact 8 through 17) shows that the County's action would truly create an "urban island" almost completely surrounded by resource lands.

Moreover, no record evidence supports the assertion in Ordinance No. 03-063 "Finding S" that this action "is not precedent for redesignation of Agricultural Land in the Stillaguamish Valley." It is an axiom of land use planning that urban uses at urban densities and intensities inhibit adjacent farm operations, and the County points to no evidence here to expect a different result in the immediate vicinity. The very fact that it felt compelled to declare that this action "is not a precedent" suggests that even the County Council anticipates the real estate speculation and conversion pressures that Ordinance No. 03-063 would fuel. Even assuming the best of intentions in "Finding S," there is no record evidence to suggest that the County's simple declaration can stem what historically has been an unyielding tide.

In summary, the Board concludes that the County's Ordinance draws scant credible and objective support from the record. In contrast, the arguments advanced by Petitioners,

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<sup>8</sup>Mr. Lane's ambitions to place an automobile dealership on his property at Island Crossing is chronicled not only in this record, but prior litigation regarding Island Crossing. See generally Dwayne Lane Motion to Intervene.

<sup>9</sup>The Board has previously observed that mere adjacency to urban services, such as utilities, or city limits "does not impose requirement that this territory be included within a UGA, unless existing cities cannot accommodate the additional projected growth and it is otherwise an appropriate location for such growth." *Tacoma v. Pierce County*, CPSGMHB Case No. 94-3-0001, Final Decision and Order, Jul. 5, 1994.

are supported by credible and objective evidence in the record. The record suggests that the land continues to meet the criteria for the designation of agricultural land. This is true regarding the question of prime farmland soil characteristics and whether the 75.5 acres are of long-term commercial significance. Contrary to the County's Ordinance Finding, the record weighs heavily toward the denial of the de-designation. The Board's review of the record and arguments presented, leads to the conclusion that the 75.5 acres previously designated as Riverway Commercial Farmland are **devoted to agriculture and continue to be of long-term commercial significance** and should not have been de-designated from the Riverway Commercial Farmland designation and A-10 zoning.

The Board concludes that the County's action removing the resource lands designation from 75.5 acres at Island Crossing was unsupported by the record and therefore was **clearly erroneous**. The Board therefore concludes that the County's reclassification of those lands from Riverway Commercial Farmland to Urban Commercial and the rezoning of them from Agriculture-10 Acres to General Commercial (CG) as contained in Ordinance No. 03-963, **does not comply** with the requirements of RCW 36.70A.170(1)(a), and RCW 36.70.060(1) and WAC 365-190-050 (pursuant to RCW 36.70A.050 and .170(1)(a)). Because RCW 36.70A.050 creates a duty for DCTED in its role adopting guidelines pursuant to WAC 365-190-050, rather than a duty for local governments, the Board dismisses the portion of Legal Issue No. 2 that alleges County noncompliance with RCW 36.70A.050.

### 3. Conclusions re: Legal Issue 2

The Board concludes that the Petitioners have carried the burden of proof to show that Snohomish County Ordinance No. 03-063 **failed to be guided by and did not substantively comply** with RCW 36.70A.020(8) and that it **failed to comply** with RCW 36.70A.040, .060(1) and .170(1)(a). The Board finds that the County's action was **clearly erroneous** in concluding that this land no longer meets the criteria for designation as agricultural land of long-term commercial significance. The Board will **remand** Ordinance No. 03-063 for the County to take legislative action to bring it into compliance with the goals and requirements of the Act.

## C. URBAN GROWTH AREA EXPANSION ISSUES

### Legal Issue No. 1

*Does the County adoption of Amended Ordinance No. 03-063, establishing a new and larger Urban Growth Area (UGA) for the City of Arlington (Arlington), fail to comply with RCW 36.70A.020(1), (2), (8), and (10) (planning goals requiring encouragement of urban growth in urban areas, reduction of sprawl, enhancement of natural resource industries and protection of the environment), RCW 36.70A.110 and RCW 36.70A.215 (limiting UGA expansions to land necessary to accommodate projected future growth and setting priorities for the expansion of urban growth areas) when the record fails to establish that the expansion is supported by a land use capacity analysis and that this*

*larger UGA is necessary to accommodate OFM population forecasts as required under the GMA?*

#### Legal Issue No. 4

*By expanding the Arlington UGA without a supporting land use capacity analysis that demonstrates additional commercial land is needed in the Arlington UGA, is Snohomish County Amended Ordinance No. 03-063 in noncompliance with Policy UG-14 of the Snohomish County County-Wide Planning Policies and therefore in noncompliance with RCW 36.70A.210(1)?*

#### 1. Applicable Law

Several provisions of the GMA are intertwined as they relate to the location, sizing, review and evaluation and expansion of UGAs. RCW 36.70A.110, and .215 deal directly with UGAs and their evaluation and expansion. RCW 36.70A.210 provides that county-wide planning policies are to be adopted to, among other things, implement the provisions of RCW 36.70A.110. Several GMA Goals from RCW 36.70A.020 also address where urban growth should be, or should not be, encouraged. The provisions of the Act challenged by Petitioners are set forth below.

RCW 36.70A.110 generally addresses the creation of UGAs. RCW 36.70A.110(1) deals with locational criteria for delineating boundaries of UGAs, and .110(3) pertains to locating or sequencing urban growth within UGAs. RCW 36.70A.110(2) regards sizing UGAs; it provides in relevant part:

Based upon the growth management population projection made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period. Each urban growth area shall permit urban densities and shall include greenbelt and open space areas. An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth.

RCW 36.70A.210 requires the County, in collaboration with its cities, to adopt county-wide planning policies which are to be “used solely for establishing a county-wide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter.”

The GMA’s Goals are to “guide the development of comprehensive plans and development regulations.” With regard to the legal issues in this case, the relevant Goals of RCW 36.70A.020 are:

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low -density development.

....  
(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

....  
(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

RCW 36.70A.215(1) requires the County and its cities to adopt county-wide planning policies to establish a review and evaluation program – the “buildable lands” report and review. The purpose of the review and evaluation program is to:

- (a) Determine whether a county and its cities are achieving urban densities within urban growth areas by comparing growth and development assumptions, targets, and objectives contained in the county-wide planning policies and the county and city comprehensive plans with actual growth and development that has occurred in the county and its cities; and
- (b) Identify reasonable measures, other than adjusting urban growth areas, that will be taken to comply with the requirements of this chapter.

The first evaluation, or “buildable lands report,” was to be completed by September 1, 2002. RCW 36.70A.215(2)(b). The evaluation component, described in RCW 36.70A.215(3), is required to:

- (a) Determine whether there is *sufficient suitable land to accommodate the county-wide population projection* established for the county pursuant to RCW 43.62.035 and the subsequent population allocations within the county and between the county and its cities and the requirements of RCW 36.70A.110;
- (b) Determine the *actual density of housing* that has been constructed and the *actual amount of land developed for commercial and industrial uses within the urban growth area* since the adoption of a comprehensive plan under this chapter or since the last periodic evaluation as required by subsection (1) or this section; and
- (c) Based upon the actual density of development as determined under (b) of this subsection, *review the commercial, industrial and housing needs by type and density range to determine the amount of land*

*needed for commercial, industrial and housing for the remaining portion of the twenty-year planning period used in the most recently Petitioners 1000 Friends and Stillaguamish Flood Control District requested that the Board enter a finding of invalidity for Ordinance No. 03-063. 1000 Friends PFR, at 5. Petitioner CTED did not join in the request for Invalidity.*

(Emphasis supplied).

Snohomish County CPP UG-14(d), as amended by Section 2 of Ordinance No. 03-072, [Exhibit J to CTED Opening Brief], (new language is shown underlined; deleted language is shown in ~~strikeout~~) provides in relevant part:

- d. **Expansion of the Boundary of an Individual UGA:** Expansion of the boundary of an individual UGA to include additional residential, commercial and industrial land shall not be permitted unless it is supported by a land capacity analysis adopted by the County Council pursuant to RCW 36.70A.110 and otherwise complies with the Growth Management Act, includes consultation with appropriate jurisdictions in the UGA or MUGA, and one of the following ~~four~~ ten conditions are met; provided that conditions six through eight do not apply to the Southwest UGA:

- ...
4. ~~Both of the following conditions are met f~~For expansion of the boundary of an individual UGA to include additional commercial and industrial land;
- a. ~~The county and city or cities within that UGA document that commercial or industrial land consumption within the UGA (city plus unincorporated UGA combined) since the start of the twenty-year planning period, equals or exceeds fifty percent of the developable commercial or industrial land supply within the UGA at the start of the planning period. In UGAs where this threshold has not yet been reached, the boundary of an individual UGA may be expanded to include additional commercial or industrial land if the expansion is based on an assessment that concludes there is a deficiency of larger parcels within that UGA to accommodate the remaining commercial or industrial growth projected for that UGA. Other parcel characteristics determined to be relevant to the assessment of the adequacy of the remaining commercial or industrial land base, as documented in the ~~Proceedures Report required by UG-14(a)~~ most recent Snohomish County Tomorrow Growth Monitoring Report of the bulidable lands review and evaluation (Buildable Lands Report), as they may be confirmed or revised based upon any new information presented at public hearings, may also be considered as a basis for expansion of the boundary of an individual UGA to include additional commercial or industrial land;~~ and
- b. ~~The county and the city or cities within the UGA consider reasonable measures adopted as an appendix to the Countywide Planning Policies pursuant to UG-14(b) that could be taken to increase commercial or~~

~~industrial land capacity inside the UGA without expanding the boundaries of the UGA.~~

- ...
10. The expansion will result in the economic development of lands that no longer satisfy the designation criteria for natural resource lands and the lands have been redesignated to an appropriate non-resource land use designation. Provided that expansions are supported by the majority of the affected cities and towns whose UGA or designated MUGA is being expanded and shall not create a significant increase in the total employment capacity (as represented by permanent jobs) of an individual UGA, as reported in the most recent Snohomish County Tomorrow Growth Monitory (sic) Report in the year of expansion.

## 2. Discussion

### Positions of the Parties

#### 1. Petitioners

1000 Friends argues that the Island Crossing UGA expansion does not comply with the Act for four reasons: 1) the expansion is isolated from any area characterized by urban growth; 2) there is no basis in the record supporting the need for additional urban land to accommodate the projected population growth; 3) the expansion is into designated agricultural lands; and 4) the expansion area contains critical areas. 1000 Friends' Opening Brief, at 8 – 17.

CTED contends that Ordinance 03-063 fails to comply with RCW 36.70A.110, RCW 36.70A.215 and RCW 36.70A.210(1) because the ordinance expands the Arlington UGA to include the Island Crossing area and redesignates the Island Crossing area for urban commercial development without the supporting land use capacity analysis that demonstrates additional commercial land is needed in the Arlington UGA. CTED asserts that under RCW 36.70A.110 and RCW 36.70A.215, the size and location of urban growth areas must be supported by a land capacity analysis, and states that in *Master Builders Association v. Snohomish County*<sup>10</sup>, the Board held that changes in the size of an urban growth area must be supported by a land use capacity analysis: "If UGAs are altered and challenged, which is not the case here, this Board requires an accounting to support the alteration." CTED Opening Brief, at 20.

Further, CTED contends that the County's Final Buildable Lands report does not support the need for additional commercial or industrial land. CTED notes that the County's DSEIS and staff reports confirm this conclusion. "The proposed expansion of the Arlington UGA for additional commercial/industrial capacity does not meet Policy UG-14's 50% threshold condition under either scenario. . . Approval of the Dwayne Lane

<sup>10</sup> CPSGMHB Case No. 01-3-0016, Final Decision and Order, Dec. 13, 2001.

proposal would, therefore, be inconsistent with GPP and CPP policies regarding review and evaluation of boundary expansions to an individual UGA.” *Citing* DSEIS at 2-36 to 2-37, *Id.*, at 25. Additionally, [the proposed UGA expansion] “is inconsistent with Countywide Planning Policy UG-14 and GPP Policy LU 1.A.9 since the proposed expansion of the Arlington UGA for additional commercial/industrial capacity does not meet the 50% threshold condition in [these CPPs and GPPs]. *Citing* Staff report at 14, *Id.*, at 26.

Finally CTED concludes “There is nothing in the [buildable lands report] that supports the expansion of the Arlington UGA to include the Island Crossing area.” *Id.*, at 27.

## 2. Respondent and Intervenor

In response, Snohomish County contends that in expanding the UGA it “concluded that Island Crossing is already characterized by urban growth.” County Response, at 16. To support this conclusion the County noted the area’s proximity to the existing Arlington UGA, and noted a commercial area on the northern edge of Island Crossing, which contains impermeable surfaces and water and sewer service which could be available to the Island Crossing area. County Response, at 16-17.

Intervenor acknowledges that the County’s existing land capacity analysis may not have supported expansion, but CPP UG-14(a)(4) [*sic* (d)(4)], as recently amended, allows for revision if new information is presented at public hearings. Lane Response, at 24-25. Intervenor continues, “[CPP UG-14(d)(4)] does not specify the date of the land capacity analysis which must be used to support a change in the UGA. If a valid capacity analysis exists, the criteria for change in UG-14 may be applied in consideration of the most recent capacity analysis.” *Id.*, at 26.

## 3. Petitioners’ Reply

1000 Friends replies that the commercial area on the northern edge of the Island Crossing UGA expansion area is a “Rural Freeway Service” area designated to serve travelers with limited sewer access to serve the newly established UGA; further, it is not characterized by urban growth, since it serves the traveling public and surrounding rural population. 1000 Friends Reply, at 24. Additionally, Petitioners argue that the UGA expansion area is not adjacent to lands characterized by urban growth since the Arlington UGA only “touches Island Crossing at the southern tip” of the area. *Id.*, at 25.

CTED reiterates that there is no land capacity analysis, or information in the buildable lands report, that supports a UGA expansion into the Island Crossing area. CTED Reply, at 9-10. Also, CTED contends that the expansion area only touches the Arlington UGA via a right-of-way along the roadway; and that the limited commercial development at the freeway interchange does not make it urban in character, even if a sewer line is present at the edge of the area. *Id.*, at 11.

## Analysis

In its discussion of Legal Issue 2, *supra*, the Board concluded that removing the resource land designation for the area and designating it as urban commercial did not comply with the relevant provisions of the Act.<sup>11</sup> The Board now turns to whether the inclusion of the area into the UGA complies with the GMA.

As to whether the expanded UGA for Island Crossing meets the *locational* requirements of RCW 36.70A.110, the Board agrees with Petitioners. The closest point of contact between Arlington's city limits and private property within the expansion area is approximately 700 feet. *See* Findings of Fact 10 through 14. Also, the fact that limited sewer service is adjacent to, or even existing within, a rural area is not dispositive on the question of whether the area is urban in character.<sup>12</sup> Therefore, the Board concludes that the subject property is not "adjacent to land characterized by urban growth," and does not comply with RCW 36.70A.110(1).

As to the *sizing* requirements for UGAs as set forth in RCW 36.70A.110(2) and .215, and *consistency* with CPP UG-14(d) [RCW 36.70A.210(1)], the Board also agrees with Petitioners. First, neither the County nor Intervenor indicates that a revised land capacity analysis supporting the need for a commercial/industrial UGA expansion has been conducted. *See* County Response, at 16-17; and Lane Response, at 24-25. Intervenor even acknowledges that the existing land capacity analysis may not have supported expansion. *See* Lane Response, at 24-25. Second, CTED correctly argues that there is nothing in the County's recent Buildable Lands Report that supports the expansion of the Arlington UGA for commercial or industrial uses to include the Island Crossing area. The County does not dispute this assertion. *See* County Response, at 16-17. Intervenor Lane however, argues that CPP UG-14(d)(4)<sup>13</sup> allows the County to revise its land capacity analysis to reflect information obtained through public hearings, which Lane contends was provided in consideration of this action. Lane Response, at 25.

Nonetheless, there has not been a revision to the County's land capacity analysis that supports the expansion of this UGA for commercial or industrial uses. Therefore, the Board concludes that the expansion of the Arlington UGA to include the Island Crossing area does not comply with RCW 36.70A.110 and .215 and is not consistent with CPP UG-14(d) and RCW 36.70A.210(1). Further, since the County has **not complied** with the UGA requirements of RCW 36.70A.110, .215 and its own CPPs (RCW 36.70A.210),

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<sup>11</sup> The Board notes that RCW 36.70A.060 does not prohibit agricultural resource lands from being included within a UGA. However, RCW 36.70A.060(4) requires a program authorizing transfer or purchase of development rights as a condition precedent to such inclusion in the UGA. In this case, none of the parties argued or offered any evidence pertaining to whether such a program exists to allow agricultural land within the UGA.

<sup>12</sup> *See* footnote 9, *supra*.

<sup>13</sup> The Board notes that even if CPP UG-14(d)(10) is offered as the basis for this UGA expansion, the Board agreed with the County and held that CPP UG-14(d)(preamble) requires a land capacity analysis to support an individual UGA expansion for commercial/industrial development. In either case, the required land capacity analysis has not been conducted in the present case. *See CTED v. Snohomish County*, CPSGMHB Case No. 03-3-0017, Final Decision and Order, (Mar. 8, 2004), at 37-39.

the Board also concludes that the County's action was not guided by Goals 1, 2, and 8 [RCW 36.70A.020(1), (2), and (8)].

### 3. Conclusions re: Legal Issues 1 and 4

The Board concludes that the Petitioners have carried the burden of proof to show that Snohomish Ordinance No. 03-063 failed to be guided by and did not substantively comply with RCW 36.70A.020(1), (2), and (8) and that it failed to comply with RCW 36.70A.110, .210(1) and .215. The Board concludes therefore the County action adopting Ordinance No. 03-063 was clearly erroneous and will remand Ordinance No. 03-063 for the County to take legislative action to bring it into compliance with the goals and requirements of the Act as interpreted and set forth in this Order.

### 3. Conclusions re: Legal Issues 1 and 4

The Board concludes that the Petitioners have carried the burden of proof to show that Snohomish Ordinance No. 03-063 failed to be guided by and did not substantively comply with RCW 36.70A.020(1), (2), and (8) and that it failed to comply with RCW 36.70A.110, .210(1) and .215. The Board concludes therefore the County action adopting Ordinance No. 03-063 was clearly erroneous and will remand Ordinance No. 03-063 for the County to take legislative action to bring it into compliance with the goals and requirements of the Act as interpreted and set forth in this Order.

## D. CRITICAL AREAS ISSUE

### Legal Issue No. 5

*By expanding the Arlington UGA into a frequently flooded area and by redesignating lands within that are for commercial use, is Snohomish County Amended Ordinance No. 03-063 in noncompliance with RCW 36.70A.060 and RCW 36.70A.170?*

#### 1. Applicable Law

RCW 36.70A.030(5) provides:

“Critical areas” include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.

RCW 36.70A.170 provides in relevant part:

(1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:

...

(d) Critical Areas.

RCW 36.70A.060 provides in relevant part:

- (2) Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170.

## 2. Discussion and Conclusions re: Legal Issue 5

The Board concludes that because it found, *supra*, that Ordinance No. 03-063 is noncompliant with the agricultural conservation and urban growth area provisions of the GMA, and remanded the Ordinance to the County, it need not and does not reach the question of whether the Ordinance fails to comply with RCW 36.70A.170(1)(d) and RCW 326.70A.060(2).

## VIII. REQUESTS FOR INVALIDITY

Petitioners 1000 Friends and Stillaguamish Flood Control District requested that the Board enter a finding of invalidity for Ordinance No. 03-063. 1000 Friends PFR, at 5. Petitioner CTED did not join in the request for Invalidity. The question of whether or not the Board should enter a finding of invalidity for Ordinance No. 03-063 was framed in the PHO as Legal Issue No. 3, which provides:

*Does the continued validity of the violations of RCW Title 36.70A (the Growth Management Act) described in Legal Issues 1 and 2 above, substantially interfere with the fulfillment of the goals of the Growth Management Act such that the enactments at issue should be held invalid pursuant to RCW 36.70A.302?*

### Applicable Law

RCW 36.70A.302 provides:

- (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
  - (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
  - (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
  - (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

- (2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

### **Findings of Fact and Conclusions of Law**

In the Board's discussion of the UGA issues [Legal Issue Nos. 1 and 4] the Board found that the Arlington UGA expansion, as effectuated by Ordinance No. 03-063, did not comply with the requirements of RCW 36.70A.110, .210(1) and .215, and was not guided by RCW 36.70A.020(1), (2) and (8). Further, in the Board's discussion of the Agricultural Lands Issue [Legal Issue No. 2] the Board found that the redesignation of agricultural lands to general commercial, as effectuated by Ordinance No. 03-063, did not comply with the requirements of RCW 36.70A.040, RCW 36.70A.060(1) and RCW 36.70A.170(1)(a) and was not guided by RCW 36.70A.020(2) and (8). The question now becomes whether the continued validity of Ordinance No. 03-063 during the period of remand, would substantially interfere with the fulfillment of the Goals of the Act.

The Board's review of the facts and circumstances involved in the Arlington UGA expansion and loss of properly designated agricultural resource lands, as discussed *supra*, leads the Board to conclude that the continued validity of noncompliant Ordinance No.03-063 will substantially interfere with Goals (1), (2), and (8) of the Act. To permit urban land use activities in Island Crossing would substantially interfere with the fulfillment of Goal 8 because it would not "encourage the conservation of productive agricultural lands" within the portion of Island Crossing presently designated agricultural, nor would it "discourage incompatible uses" adjacent to the agricultural resource lands that surround Island Crossing on all sides. To expand the Arlington UGA in view of the County's admission that its own land capacity policies and inventory show no need for additional commercial land area would not "encourage development in [existing] urban areas" in contravention of Goal 1.

The County's action to convert lands from their proper agricultural designations to urban commercial uses and to include Island Crossing within the UGA flies in the face of Goals, 1, 2, and 8. It would violate the GMA's clear direction that urban growth should be directed to urban areas where services and facilities already exist and that UGAs should not be expanded absent a documented unmet need for additional urban land. Development of Island Crossing under the provisions of Ordinance No. 03-063 would immediately and perpetually impair resource land activities in the agricultural lands that surround it on all sides, ignite real estate expectations and speculation about conversion of those lands to urban designations, hasten future demand for urban level services and infrastructure in the surrounding area, and ultimately erode the long-term viability of the resource lands of the Stillaguamish River Valley. Such an outcome plainly violates the

GMA's "legislative mandate for the conservation of agricultural land." *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 558, 14 P.3d 133 (2000)

Therefore, the Board enters a **Determination of Invalidity with respect to the following portions of Ordinance No. 03-063**:

- The portion that expanded the Arlington urban growth area by 110.5 acres to include the Island Crossing area.
- The portion that replaced the 75.5 acre area of Riverway Commercial Farmland designation with an Urban Commercial designation
- The portion that rezoned the 75.5 acres of A-10 to General Commercial (GC)
- The portion that replaced the 35.5 acre area of Rural Freeway Service with an Urban Commercial designation
- The portion that rezoned the 35.5 acres of Rural Freeway Service (RFS) to General Commercial

#### **IX. ORDER**

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

1. With respect to adoption of Ordinance No. 03-063, the Board issues Snohomish County a **finding of noncompliance** with RCW 36.70A.020(1), (2), (8), and (10) and .040, .060(1), .110, .170(1)(a) and .215.
2. The Board enters a **finding of invalidity** with respect to the following portions of Ordinance No. 03-063:
  - The portion that expanded the Arlington urban growth area by 110.5 acres to include the Island Crossing area.
  - The portion that replaced the 75.5 acre area of Riverway Commercial Farmland designation with an Urban Commercial designation
  - The portion that rezoned the 75.5 acres of A-10 to General Commercial (GC)
  - The portion that replaced the 35.5 acre area of Rural Freeway Service with an Urban Commercial designation
  - The portion that rezoned the 35.5 acres of Rural Freeway Service (RFS) to General Commercial
3. The Board establishes **4:00 p.m. on May 24, 2004** as the deadline for Snohomish County to take legislative action to achieve compliance with the goals and requirements of the GMA as interpreted and set forth in this Order.
4. By **Wednesday, June 2, 2004, at 4:00 p.m.**, or within one week of taking the legislative action described in paragraph 2 above, whichever comes first, the County

shall submit to the Board, with a copy simultaneously served on Petitioners and Intervenor, an original and four copies of its Statement of Actions Taken to Comply (the SATC). Attached to the SATC shall be a copy of any legislative action taken in response to this Order.

5. By **Wednesday, June 9, 2004, at 4:00 p.m.**, the Petitioners and Intervenor shall each submit to the Board, with a copy simultaneously served on opposing counsel, an original and four copies of any Response to the SATC.
6. The Board schedules a **Compliance Hearing** in this matter for **10:00 a.m.** on **Monday, June 14, 2004**. The Compliance Hearing will be held at the Board's offices at 900 Fourth Avenue, Suite 2470, in Seattle, WA. In the event that the County takes legislative action earlier than the date established in paragraph 2 above, it shall so notify the Board, after which the Board will issue a subsequent Order setting the revised date for Compliance Hearing.

So ORDERED this 22nd day of March 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Bruce C. Laing, FAICP  
Board Member

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Edward G. McGuire, AICP  
Board Member

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Joseph W. Tovar, FAICP  
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300. Any party wishing to file a motion for reconsideration of this final order must do so within ten days of service of this order. WAC 242-02-830(1). Any party wishing to appeal this final order to superior court must do so within thirty days of service of this order. WAC 242-02-898.

**CENTRAL PUGET SOUND  
GROWTH MANAGEMENT HEARINGS BOARD  
STATE OF WASHINGTON**

1000 FRIENDS OF WASHINGTON,  
STILLAGUAMISH FLOOD CONTROL  
DISTRICT, AGRICULTURE FOR  
TOMORROW, PILCHUCK AUDUBON  
SOCIETY;

and

THE DIRECTOR OF THE STATE OF  
WASHINGTON DEPARTMENT OF  
COMMUNITY, TRADE AND  
ECONOMIC DEVELOPMENT,

Petitioners,

v.

SNOHOMISH COUNTY,

Respondent,

and

DWAYNE LANE,

Intervenor.

Case No. 03-3-0019c  
*[Island Crossing]*

**ORDER FINDING CONTINUING  
NONCOMPLIANCE AND  
CONTINUING INVALIDITY**

and

**RECOMMENDATION FOR  
GUBERNATORIAL SANCTIONS**

**I. SYNOPSIS**

On March 22, 2004, the Central Puget Sound Growth Management Hearings Board issued a Final Decision and Order (the **FDO**) in Case No. 03-3-0019c, finding that Snohomish County's comprehensive plan and development regulations for the Island Crossing Area did not comply with the goals and requirements of the Growth Management Act (the **GMA**). The FDO entered findings of noncompliance and invalidity for Snohomish County Ordinance No. 03-063 and remanded the matter to the County for subsequent amendments to achieve compliance with the GMA.

On May 24, 2004, the County passed Ordinance No. 04-057 in response to the FDO, re-adopting the same plan and development regulations that the Board had found noncompliant and invalid in Ordinance No. 03-063. At the compliance hearing, the burden was on the County to demonstrate that its actions removed substantial interference with the goals of the Act and merited a rescission of the determination of invalidity.

The County argued that new information justified the County's action again removing agricultural resource land designations, designating the entire Island Crossing area for commercial uses and including the area within the Arlington urban growth area. Arguing in support of the County was Intervenor Dwayne Lane (**Lane**), a landowner in Island Crossing who wishes to re-locate his automobile dealership there. In opposition were petitioners 1000 Friends of Washington (**1000 Friends**), the Stillaguamish Flood Control District (the **SFCD**), and the Washington State Department of Community, Trade and Economic Development (**CTED**), acting on behalf of and at the direction of Governor Gary Locke.

The Board agreed with petitioners that the County's "new information" did not cure the defects of Ordinance No. 03-063 and therefore found that Ordinance No. 04-057 does not comply with the goals and requirements of the GMA regarding resource lands and urban growth areas. The Board entered a finding of continuing noncompliance and invalidity for the Snohomish County comprehensive plan and development regulation provisions for Island Crossing.

The Board noted that this is the third time that Snohomish County has attempted to convert agricultural land at Island Crossing into the Arlington urban growth area, notwithstanding consistent contrary readings of the law by the Snohomish County SEPA Responsible Official, Snohomish County Executive, the Growth Management Hearings Board, Snohomish County Superior Court, the First Division of the Washington State Court of Appeals, and the Governor of the State of Washington. The Board recommended to Governor Locke that he impose financial sanctions until and unless Snohomish County provides assurance that it will take no legislative action contrary to the Board's interpretation of the GMA in this matter unless those holdings are subsequently reversed by a court of competent jurisdiction.

## **II. PROCEDURAL BACKGROUND**

### **A. Case History Preceding Final Decision and Order**

On March 22, 2004, the Central Puget Sound Growth Management Hearings Board (the **Board**) entered a Final Decision and Order (the **FDO**) in the above captioned case finding that Snohomish County Ordinance No. 03-063 was in noncompliance with RCW 36.70A.020(1), (2), (8), and (10) and .040, .060(1), .110, .170(1)(a) and .215, and entered a finding of invalidity with respect to the zoning and plan amendments wrought by adoption of Ordinance No. 03-063. The portion of the procedural history of this case that preceded issuance of the FDO appears in Appendix A.

## B. Compliance Phase History

On March 30, 2004, the Board received "Snohomish County's Motion for Determination of Validity Pursuant to RCW 36.70A.302(4)" (the **County's Motion**).

On March 31, 2004, the Board issued a "Notice of Corrected Final Decision and Order" which listed a number of corrections to the FDO and attached a "Corrected FDO" (the **Corrected FDO**).

On April 9, 2004, in response to the County's Motion, the Board issued "Order Rescinding Findings of Noncompliance and Invalidity" (the **Board's April 9, 2004 Order Rescinding Findings of Noncompliance and Invalidity**).

On May 26, 2004, the Board received "Petitioners' Request for Permission to File a Motion after Motion Deadline/Motion to Rescind Finding of Compliance and to Reinstate Invalidity" (**Petitioners' May 26, 2004 Pleading**). Attached to Petitioners' May 26, 2004 Pleading was a copy of Snohomish County "Amended Emergency Ordinance No. 04-057" (**Ordinance No. 04-057**).

On May 27, 2004, the Board received a letter from Andrew S. Lane, counsel for Snohomish County, opposing the Petitioners' May 26, 2004 Pleading.

On May 28, 2004, the Board issued "Order on Petitioners' Request and Notice Regarding Compliance Hearing" (the **Board's May 28, 2004 Order**). The Board's May 28, 2004 Order granted leave for 1000 Friends to file "Petitioners' Motion to Rescind Finding of Compliance and to Reinstate Invalidity" (the **Petitioners' Motion**) and provided that any interested party could, at its option, submit a Response Brief to Petitioners' Motion by noon on June 1, 2004. The Board's May 28, 2004 Order also changed the start time of the Compliance Hearing to 1:30 p.m. on Monday, June 14, 2004.

After the issuance of the Board's May 28, 2004 Order, the Board received the following: correspondence from Henry E. Lippek, counsel for the Stillaguamish Flood Control District; a letter from Andrew S. Lane, (signed by Millie Judge), counsel for Snohomish County; and two letters from Todd C. Nichols, counsel for Intervenor Dwayne Lane.

No Response pleadings were received by the deadline set forth in the Board's May 28, 2004 Order.

On June 1, 2004, the Board issued "Order Rescinding the April 9, 2004 Order Rescinding Findings of Noncompliance and Invalidity."

On June 2, 2004, the Board received Snohomish County's Statement of Actions Taken to Comply" (the **SATC**) with attached exhibits, including a copy of Amended Ordinance No. 04-057.

On June 9, 2004, the Board received "Intervenor Lane's Response to Snohomish County's Statement of Actions Taken to Comply and Statement of Authorities" (the

**Lane Response**); “CTED’s Response to Snohomish County’s Statement of Actions Taken to Comply” (the **CTED Response**); “Petitioners’ Response to Snohomish County’s Statement of Actions Taken to Comply” (the **1000 Friends Response**); and “Flood District’s Response to Snohomish County’s Statement of Actions Taken to Comply” (the **SFCD Response**) with attached exhibits.

The Board conducted the compliance hearing in this matter on June 14, 2004 beginning at 1:30 p.m. in the conference center on the fifth floor of the Bank of California Building, 900 Fourth Avenue, in Seattle. Present for the Board were members Edward G. McGuire, Bruce C. Laing, and Joseph W. Tovar, presiding officer. Representing the parties were the following: for the County were Andrew S. Lane and Shawn Aronow; for Intervenor Dwayne Lane was Todd C. Nichols; for 1000 Friends of Washington was John T. Zilavy; for CTED was Alan D. Copsey; and for the SFCD were Henry E. Lippek and Ashley E. Evans. Court reporting services were provided by J. Gayle Hays, of Byers and Anderson, Inc., Seattle. No witnesses testified. After hearing oral argument from the parties, Mr. Tovar stated that the Board would accept simultaneous post-compliance hearing briefing from the parties on the narrow subject of whether the Board has continuing authority to answer Legal Issue No. 5 as set forth in the Prehearing Order. He stated that such briefing was to be submitted not later than 4:00 p.m. on Thursday, June 17, 2004 and not to exceed 10 pages in length from the combined Petitioners and 10 pages in length from the combined County and Intervenor. After the compliance hearing, a transcript was ordered (the **Transcript**).

On June 17, 2004, the Board received “Intervenor Lane’s and Respondent Snohomish County’s Joint Memorandum of Authorities Regarding Critical Areas Compliance” (the **Lane/Snohomish Brief Re: Legal Issue 5**) and “Petitioners’ Joint Brief Re: The Board’s Jurisdiction to Address Issue 5 (Critical Areas)” (the **Petitioners Brief Re: Legal Issue 5**).

### **III. FINDINGS OF FACT**

1. The FDO specifically identified the invalidated portions of Ordinance No. 03-063 as:
  - The portion that expanded the Arlington urban growth area by 110.5 acres to include the Island Crossing area.
  - The portion that replaced the 75.5 acre area of Riverway Commercial Farmland designation with an Urban Commercial designation
  - The portion that rezoned the 75.5 acres of A-10 to General Commercial (GC)
  - The portion that replaced the 35.5 acre area of Rural Freeway Service with an Urban Commercial designation
  - The portion that rezoned the 35.5 acres of Rural Freeway Service (RFS) to General Commercial

FDO, at 40-41.

2. Snohomish County adopted Ordinance No. 04-057 on May 24, 2004. SATC, Attachment 1.
3. The title caption of Ordinance No. 04-057 reads: "RELATING TO GROWTH MANAGEMENT; REVISING THE EXISTING URBAN GROWTH AREA FOR THE CITY OF ARLINGTON; ADOPTING MAP AMENDMENTS TO THE GROWTH MANAGEMENT ACT COMPREHENSIVE PLAN; AND ADOPTING COUNTY-INITIATED AREA-WIDE REZONES PURSUANT TO CHAPTER 30.74 SCC; AND AMENDING AMENDED ORDINANCE 94-125, ORDINANCE 94-120, AND EMERGENCY ORDINANCE 01-047."

*Id.*

4. Among the County Council's findings of fact and conclusions listed in Section 1 of Ordinance No. 04-057 are the following:

B. The proposal by Dwayne Lane to amend the FLU map of the GPP to expand the Arlington UGA to include 110.5 acres to be redesignated from Riverway Commercial Farmland and Rural Freeway Service to Urban Commercial and rezone 110.5 acres from Rural Freeway Service and Agriculture-10 Acres to General Commercial more closely meets the policies of the GPP than the existing plan designation based on the planning commissioner's following findings of facts and conclusions:

1. When Dwayne Lane purchased the subject property, the General Policy Plan designation was Urban Commercial.

....

6. Ragnar soils are the best soils for production of commercial crops and there are no Ragnar soils at Island Crossing. The Island Crossing area consists primarily of Puget soils that are adequate for hay, green chop and pasture, but are not suitable for more valuable crops like berries and corn. The Puget soils are considered "prime" only when artificially drained, which the land at the site is not, and even when drained the Puget series is considered low productivity.

7. Farming is no longer financially viable at Island Crossing. Busy highways, high assessed value, small parcel size and safety issues eliminate the viability of the Island Crossing interchange site as agricultural land.

8. Snohomish County is growing rapidly and it is inevitable that sites like Island Crossing will be converted from agricultural uses to commercial uses.

9. The Commission has concerns about the history of floods in this area and the associated impacts. However, the Commission believes that the impacts can be mitigated as is clearly shown in the DSEIS.

D. The County has received a new analysis prepared by the Higa Burkholder Associates, LLC, ("Buildable Lands Report 2003 Update, City of Arlington UGA", County Council Exhibit 12) that analyzes commercial and industrial land capacity in the Arlington UGA, and that also analyzes the availability of large parcels of commercial or industrial lands that have high visibility for commercial uses. From this analysis the Council concludes the Arlington UGA experiences a deficiency of larger parcels within that UGA to accommodate the remaining commercial or industrial growth projected for that UGA.

.....

X. Approval of the Island Crossing Interchange Docket Proposal is not precedent for redesignation of Agricultural land in the Stillaguamish Valley . . .

Y. The land contained within the Island Crossing Interchange Docket Proposal is not agricultural land of long term commercial significance . . . Council finds that this land cannot be profitably farmed, and is not agricultural land of long term commercial significance.

Z. The Island Crossing Interchange Docket Proposal site has episodically flooded in the past and will continue to episodically flood in the future, whether or not the site is developed. The relevant question is not whether the proposal site experiences floods, but rather does the site experience significant adverse flood impacts which cannot be reasonably mitigated . .

AA. In Ex. 135, applicant of the Island Crossing Interchange Docket Proposal states various development techniques and plans which will be voluntarily used to minimize the prospect of flood impacts . . .

5. Section 3 of Ordinance No. 04-057 provides, in part:

After the effective date of Emergency Ord. 04-057, development in the Island Crossing Interchange Docket Proposal area added to the Arlington UGA by Emergency Ord. 04-057 should be conditioned upon use of the flood protection measures outlined above in finding AA of Section 1, provided such flood protection measures are technically feasible and do not defeat the purpose of the development.

*Id.*

6. The substance of the amendments created by Ordinance No. 04-057 are identical to those created by Ordinance No. 03-063. Transcript, at 18.

7. The Island Crossing area is located within the floodplain of the Stillaguamish River. Planning and Development Services (PDS) Report, at 10. FDO, Findings of Fact, at 9-10.

8. The Stillaguamish River basin suffers from damaging floods on average every three to five years according to the Federal Emergency Management Agency. PDS Report, at 11. *Id.*
9. The 110.5 acre area subject to Ordinance No. 03-063 [and Ordinance No. 04-057] is configured as a multi-sided polygon with two roughly mile-long sides that follow north-south right-of-way lines, two smaller but *parallel* east-west sides that do not follow right-of-way lines, and a number of other smaller sides that follow jogs in right-of-way or property lines. DEIS, Figure 1-2, scale map of "Proposed Comprehensive Plan Amendment – Dwayne Lane." *Id.*
10. The two long sides of the 110.5 acre shape are (a) the western side which coincides with the western edge of the Interstate 5 right-of way for approximately 5,900 linear feet; and (b) the eastern side of approximately 5,000 linear feet, of which roughly the southerly 4,300 feet coincide with the eastern edge of the Smokey Point Boulevard right-of-way. The two parallel sides of this shape are (a) the northerly edge which is approximately 2,700 linear feet and coincides with the northern edge of parcels which front onto S.R. 530; and (b) the southern side, which is roughly 450 linear feet long, and lies entirely within public right-of-way. *Id.*
11. The southerly 700 feet of the 110.5 acre shape (*i.e.*, that portion which lies south of 200<sup>th</sup> Street NE, if extended) is entirely within either Interstate 5 right-of-way or Smokey Point Boulevard right-of-way. *Id.*
12. The City of Arlington city limits abut the southern edge of the 110.5 acre shape. *Id.*
13. The closest point of contact between Arlington's city limits and private property within the 110.5 acre shape is approximately 700 feet. *Id.*
14. The Island Crossing Area is designated floodway fringe by the County's flood hazard regulations. PDS Report, at 14. *Id.*
15. With the exception of the cities of Stanwood and Arlington, the flood plain of the main fork of the Stillaguamish River is designated on the County's Future Land Use Map as Agricultural Resource Land. Snohomish County General Policy Plan, Future Land Use Map, dated May 24, 2004, posted online at <http://www.co.snohomish.wa.us/pds/905-GIS/maps/flu/flul17.pdf>.
16. The agricultural resource industry in the Stillaguamish River Valley includes Twin City Foods, Inc. of Stanwood Washington. SFC D Response, Ex. 6.
17. Lands in the "Island Crossing triangle" have historically and are currently being contracted to provide crops for processing by Twin City Foods. *Id.*
18. While the "Island Crossing triangle" is within the flood plain of the Stillaguamish River, the existing Arlington UGA to the south sits on higher ground above the flood plain. Transcript, at 45.

#### **IV. Legal Issue No. 5 regarding the GMA's Critical Areas Provisions**

In the FDO, the Board did not reach Legal Issue No.5 which alleged noncompliance with RCW 36.70A.170(1)(d) and RCW 36.70A.060(2).<sup>1</sup> Legal Issue No. 5 is:

*By expanding the Arlington UGA into a frequently flooded area and by redesignating lands within that area for commercial use, is Snohomish County Amended Ordinance No. 03-063 in noncompliance with RCW 36.70A.060 and RCW 36.70A.170?*

During the compliance phase of this case, Petitioners asked that the Board now answer Legal Issue No. 5 as it applies to Ordinance No. 04-057. CTED Response, at 19. In post-compliance hearing briefing, the parties argued whether the Board retains jurisdiction to answer Legal Issue No. 5 in a compliance proceeding.

While both sides present cogent arguments, the most compelling is the argument that the Petitioners did not avail themselves of the opportunity to file a post-FDO motion specifically requesting that the Board also address Legal Issue No. 5. Lane/Snohomish Brief Re: Legal Issue 5, at 2. Had Petitioners done so, the Board clearly would have had jurisdiction to answer Legal Issue No. 5 in the context of clarifying or reconsidering the FDO. The Board concludes that it lacks authority to answer Legal Issue No. 5 during the compliance phase of this proceeding.

While the Board will not address as a separate legal claim the issue of compliance of Ordinance No. 04-057 with the GMA's critical areas provisions, facts presented in that context regarding the area's environmental attributes do shed light on the analysis of issues which remain before the Board. Therefore, the Board will take note, as appropriate, of those environmental factors in the analysis, *infra*.

#### **V. APPLICABLE LAW AND PLEADINGS OF THE PARTIES**

##### **A. Noncompliance, Invalidity and Sanctions**

Once the Board finds a jurisdiction is not in compliance with the GMA and remands the matter back to the jurisdiction, the Board must specify the compliance period in its FDO. RCW 36.70A.300. The Act prescribes a limited period to achieve compliance; it provides in relevant part:

[In the FDO], [t]he board shall specify a reasonable time not in excess of one hundred eighty days, or such longer period as determined by the board

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<sup>1</sup> The FDO stated: "The Board concludes that because it found, *supra*, that Ordinance No. 03-063 is noncompliant with the agricultural conservation and urban growth area provisions of the GMA, and remanded the Ordinance to the County, it need not and does not reach the question of whether the Ordinance fails to comply with RCW 36.70A.170(1)(d) and RCW 36.70A.060(2)." FDO, at 38.

in cases of unusual scope or complexity, within which the . . . city shall comply with the requirements of this chapter.

RCW 36.70A.300(3)(b).

In the Board's FDO, May 24, 2004 was established as the compliance date by which Snohomish County was required to take legislative action to achieve compliance with the goals and requirements of the Act. FDO, at 40.

RCW 36.70A.330 provides, in relevant part:

- (1) After the time set for complying with the requirements of this chapter under RCW 36.70A.300(3)(b) has expired, or at an earlier time upon the motion of a . . . county or city subject to a determination of invalidity under RCW 36.70A.300 [now RCW 36.70A.302], the board shall set a hearing for the purpose of determining whether the . . . city is in compliance with the requirements of this chapter.
- (2) The board shall conduct a hearing and issue a finding of compliance or noncompliance with the requirements of this chapter and with any compliance schedule established by the board in its final order. . . .
- (3) If the board after a compliance hearing finds that the . . . county or city is not in compliance, the board shall transmit its finding to the Governor. The board may recommend to the Governor that the sanctions authorized by this chapter be imposed. The board shall take into consideration the . . . county's or city's efforts to meet its compliance schedule in making the decision to recommend sanctions to the Governor.

The Board remanded the matter with direction to Snohomish County to take appropriate legislative action. Snohomish in its SATC points to Ordinance No. 04-057 as its action taken to comply with the FDO. Because the Board found that Snohomish County's prior action was not only noncompliant, but also invalid, Snohomish bears the burden of proof:

A county or city subject to a determination of invalidity made under RCW 36.70A.300 or 36.70A.302 has the burden of demonstrating that the ordinance or resolution it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter under the standard of RCW 36.70A.302(1).

RCW 36.70A.320(4).

RCW 36.70A.340 provides:

Upon receipt from the board of a finding that a state agency, county, or city is in noncompliance under RCW 36.70A.330, or as a result of failure to meet the requirements of RCW 36.70A.210, the governor may either:

(1) Notify and direct the director of the office of financial management to revise allotments in appropriation levels;

(2) Notify and direct the state treasurer to withhold the portion of revenues to which the county or city is entitled under one or more of the following: The motor vehicle fuel tax, as provided in chapter 82.36 RCW; the transportation improvement account, as provided in RCW 47.26.084; the urban arterial trust account, as provided in RCW 47.26.080; the rural arterial trust account, as provided in RCW 36.79.150; the sales and use tax, as provided in chapter 82.14 RCW; the liquor profit tax, as provided in RCW 66.08.190; and the liquor excise tax, as provided in RCW 82.08.170; or

(3) File a notice of noncompliance with the secretary of state and the county or city, which shall temporarily rescind the county or city's authority to collect the real estate excise tax under RCW 82.46.030 until the governor files a notice rescinding the notice of noncompliance.

## **B. Substantive Requirements and Goals of the Act**

### **1. GMA Provisions concerning Agricultural Resource Lands**

RCW 36.70A.020 provides in relevant part:

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

....  
(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

RCW 36.70A.040 provides in relevant part:

(1) Each county that has both a population of fifty thousand or more . . . shall conform with all of the requirements of this chapter.

....  
(3) Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a county-wide planning policy under RCW 36.70A.210; (b) the county and each city located within the county shall designate critical areas, agricultural lands, forest lands, and mineral resource lands, and adopt development regulations conserving these designated agricultural lands, forest lands, and mineral resource lands and protecting these designated critical areas, under RCW 36.70A.170 and 36.70A.060; (c) the

county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; . . .

Emphasis added.

RCW 36.70A.050 provides in relevant part:

(1) Subject to the definitions provided in RCW 36.70A.030, the department shall adopt guidelines, under chapter 34.05 RCW, no later than September 1, 1990, to guide the classification of: (a) Agricultural lands; (b) forest lands; (c) mineral resource lands; and (d) critical areas. The department shall consult with the department of agriculture regarding guidelines for agricultural lands, the department of natural resources regarding forest lands and mineral resource lands, and the department of ecology regarding critical areas.

.....  
(3) The guidelines under subsection (1) of this section shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington state. The intent of these guidelines is to assist counties and cities in designating the classification of agricultural lands, forest lands, mineral resource lands, and critical areas under RCW 36.70A.170.

Emphasis added.

RCW 36.70A.060 provides in relevant part:

(1) Each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. . . .

RCW 36.70A.170 provides in relevant part:

(1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:

(a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for commercial production of food or other agricultural products;

Emphasis added.

Agricultural lands of long term commercial significance (ALLTCS) is defined as "the growing capacity, productivity, and soil composition of the land for long-

term commercial production, in consideration with the land's proximity to population areas, and the possibility of more intense uses of the land." RCW 36.70A.030 (10).

## 2. GMA Provisions regarding Urban Growth Areas

RCW 36.70A.020 provides in relevant part:

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

RCW 36.70A.110(1) sets forth locational factors which govern the designation of urban growth areas:

Each county that is required or chooses to plan under RCW 36.70A.040 shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. Each city that is located in such a county shall be included within an urban growth area. An urban growth area may include more than a single city. An urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth whether or not the urban growth area includes a city, or is adjacent to territory already characterized by urban growth, or is a designated new fully contained community as defined by RCW 36.70A.350

RCW 36.70A.215(1) requires the County and its cities to adopt county-wide planning policies to establish a review and evaluation program – the “buildable lands” report and review. The purpose of the review and evaluation program is to:

- (a) Determine whether a county and its cities are achieving urban densities within urban growth areas by comparing growth and development assumptions, targets, and objectives contained in the county-wide planning policies and the county and city comprehensive plans with actual growth and development that has occurred in the county and its cities; and
- (b) Identify reasonable measures, other than adjusting urban growth areas, that will be taken to comply with the requirements of this chapter.

The first evaluation, or “buildable lands report,” was to be completed by September 1, 2002. RCW 36.70A.215(2)(b). The evaluation component, described in RCW 36.70A.215(3), is required to:

- (a) Determine whether there is sufficient suitable land to accommodate the county-wide population projection established for the county pursuant to RCW 43.62.035 and the subsequent population allocations within the county and between the county and its cities and the requirements of RCW 36.70A.110;
- (b) Determine the actual density of housing that has been constructed and the actual amount of land developed for commercial and industrial uses within the urban growth area since the adoption of a comprehensive plan under this chapter or since the last periodic evaluation as required by subsection (1) or this section; and
- (c) Based upon the actual density of development as determined under (b) of this subsection, review the commercial, industrial and housing needs by type and density range to determine the amount of land needed for commercial, industrial and housing for the remaining portion of the twenty-year planning period used in the most recently adopted comprehensive plan.

### **C. Positions of the Parties and Board Analysis**

#### **1. Agricultural Resource Lands**

##### **a. Positions of the Parties**

###### **Snohomish County and Lane**

The County states that, in response to the FDO, the County Council conducted a public hearing on May 19, 2004 and debated the new testimony and comments before the public on May 24, 2004. SATC, at 2. The Council "heard from individuals who own agricultural land in Island Crossing, live in or near Island Crossing and have lifelong and current knowledge of Island Crossing." SATC, at 2-3. Oral testimony in support of the proposition that agriculture at Island Crossing does not have long term commercial significance was cited from Roberta Winter, Orin Barlund, John Henken, and John Koster. *Id.* Written and oral testimony in support of the proposition that Island Crossing retains long term commercial significance for agriculture was cited from Robert Grimm, Tristan Klesick, Roger Lervick, Ralph Omlid, Leland Larson. SATC, at 5-6. The County states: "The witnesses that provided testimony in support of farming in this area were less credible in the Council's view, because they spoke of speculative possibilities, rather than the existing market realities testified to by Winters, Barlund, and Henken." SATC, at 7.

The County also asserts that no evidence was presented showing that redesignating Island Crossing would have any negative impact on adjacent agricultural lands. The County argues:

Although the Board opined that “[i]t is an axiom of land use planning that urban uses at urban densities and intensities inhibit adjacent farm operations,” the FDO cited no evidence from the record to support its opinion. There is no evidence to support a conclusion that the buffer created by these highways will not be adequate to avoid negative impacts on adjacent lands.

*Id.*

Intervenor Lane supports the County’s adoption of Ordinance No. 04-057 and adopted the County’s SATC by reference. Lane Response, at 2. The balance of the Lane brief cites statutory references, Board and court decisions addressing the standard of review. Lane Response, at 2-9.

### CTED, 1000 Friends and SFCD

CTED asserts that the same fatal errors that rendered Ordinance No.03-063 noncompliant and invalid have been repeated in Ordinance No. 04-057. CTED states:

The County makes the same error it made when it adopted Ordinance 03-063; it treats economic viability as if it were the sole determinant of long-term commercial significance. As we pointed out in our opening brief . . . the economic viability of farming at Island Crossing is but one factor to consider in assessing whether agricultural lands must be designated and conserved under the GMA, especially, as here, where the viability is threatened by adjacent or pending land uses.

CTED Response, at 8, citing CTED Opening Brief, at 39.

CTED points to the GMA definition of “long-term commercial significance” to support its contention that soils conditions and capabilities are the primary determinant and that, other factors, such as proximity to population areas and the possibility of more intense uses of the land, are secondary ones. CTED Response, at 8. It argues that the “procedural criteria” concerning designation of agricultural resource lands<sup>2</sup> are meant to

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<sup>2</sup> The Department of Community, Trade, and Economic Development was directed by RCW 36.70A.050 to adopt guidelines to guide the classification of agricultural lands. These provide:

- (1) In classifying agricultural lands of long-term significance for the production of food or other agricultural products, counties and cities shall use the land-capability classification system of the United States Department of Agriculture Soil Conservation Service [SCS] as defined in Agricultural Handbook No. 210. These eight classes are incorporated by the United States Department of Agriculture [USDA] into map units described in published soil surveys. These categories incorporate consideration of the growing capacity, productivity and soil composition of the land. Counties and cities shall also consider the combined effects of proximity to population areas and the possibility of more intense uses of the land as indicated by:
  - a. The availability of public facilities;
  - b. Tax status;
  - c. The availability of public services;

be applied on an area-wide basis for designating such lands, not as a parcel-by-parcel checklist for de-designating land.

1000 Friends discounts the “anecdotal testimony from two additional farmers who each say that he personally wouldn’t farm Island Crossing because it would be too expensive or the location of the highways make it too dangerous.” 1000 Friends Response, at 2. 1000 Friends argues that the County misunderstands and mischaracterizes its burden in view of the Board’s prior finding of invalidity. Petitioner states:

The County argues that the board may not substitute its judgment for that of the Council on factual matters, or assessing witness credibility. The County states that “the question is whether Council’s decision was clearly erroneous, not whether Petitioners or the Board would have decided another way. Both of these statements are incorrect when the SATC is addressing invalidity. The question for the board on compliance is whether it is persuaded by the record that *Emergency Ordinance* 04-057 does not substantially interfere with the goals of the GMA. Petitioners urge that the answer is no.

1000 Friends Response, at 3-4. Footnotes omitted. Emphasis in original.

With respect to the criteria listed at WAC 365-190-050, 1000 Friends points out that “The SATC does not present methodical evidence on any of these criteria. Instead, the SATC presents anecdotal testimony from three farmers . . . [Barlond, Henken, and Winter.]” 1000 Friends Response, at 4. With respect to Mr. Barlond, petitioner states:

This testimony is not accompanied by any detailed analysis into the economics of farming that lead to a conclusion that no one could make a living farming on Island Crossing. This is not sufficient evidence for the County to meet its burden of establishing that dedesignating Island Crossing no longer should carry a tarnish of invalidity. It is additional anecdotal evidence.

1000 Friends Response, at 5.

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- d. Relationship or proximity to urban growth areas;
  - e. Predominant parcel size;
  - f. Land use settlement patterns and their compatibility with agricultural practices;
  - g. Intensity of nearby land uses;
  - h. History of land development permits issued nearby;
  - i. Land values under alternative uses; and
  - j. Proximity to markets.
- (2) In defining categories of agricultural lands of long-term commercial significance for agricultural production, counties and cities should consider using the classification of prime and unique farmland soils as mapped by the Soil Conservation Service. If a county or city chooses to not use these categories, the rationale for that decision must be included in its next annual report to the department of community development.

WAC 365-190-050.

Petitioner SFCD disputes the veracity of Finding No. 1 of Ordinance No. 04-057, which states "When Dwayne Lane purchased the subject property, the GPP designation was Urban Commercial." SFCD Response, at 11. SFCD asserts that when Dwayne Lane purchased his interest in the former site of the Winters farm in 1993, the property was zoned Ag-10. *Id.*<sup>3</sup>

SFCD agrees with other Petitioners that statements by individuals that they are incapable of profitably farming Island Crossing does not indicate a lack of long-term commercial significance. SFCD states:

[U]nder GMA, it is not permissible to consider prospective economic returns as a primary criterion for redesignating agricultural land because "it will always be financially more lucrative to develop such land for uses more intense than agriculture." *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 959 P.2d 1091, 1097 (1998).

SFCD Response, at 10.

#### **b. Board Analysis**

By the County's admission, the land use plan and zoning designations wrought by Ordinance No. 04-057 are identical to those created by noncompliant and invalid Ordinance No. 03-063. Transcript, at 18. The only remedial action taken by the County on remand from the Board was to place more testimony in its record, both pro and con, regarding the historical or speculative future ability of specific individuals to profitably farm specific parcels within the Island Crossing triangle. The County insists that, notwithstanding soils characteristics, the Council may divine the long-term commercial significance of agricultural lands by weighing the credibility of opposing opinions.

The County and Lane make much of the opinions expressed by Mrs. Winter, Mr. Barlund and Mr. Henken, three individuals whom the County characterizes as knowledgeable about "existing market realities"<sup>4</sup> Mrs. Winter relates her experiences as a dairy farmer before her family sold the property to Dwayne Lane, yet asserted no particular expertise as a real estate or agricultural industry analyst, nor did the County point to any. Nor did she, Mr. Barlund or Mr. Henken address either the criteria listed at WAC 365-190-050 nor the issue of the long-term agricultural significance of the larger pattern of agricultural land of which the Island Crossing triangle is a part, *i.e.*, the Stillaguamish River Valley. With regard to Mr. Henken's remarks, the Board notes that he is a landowner within the Island Crossing triangle. SATC, at 4. Just as the Supreme Court has clarified that "land

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<sup>3</sup> SFCD quotes portions of its comments to the County: "On December 15, 1993, Mr. Lane and Mr. Henken jointly purchased the Winter's farm, parcel #31050800301000." *Id.* Neither the County nor Lane disputed this assertion. At the compliance hearing, counsel for Lane stated that he did not know when his client purchased property in the Island Crossing triangle. Transcript, at 24.

<sup>4</sup> SATC, at 7.

owner intent” is not determinative of the “devoted to” prong<sup>5</sup> of resource lands designations, the Board agrees with CTED that “land owner intent” alone cannot be conclusive in determining LTCS.<sup>6</sup>

In the final analysis, however, the relative weight or credibility that the County assigned to the opinions expressed by individuals during the May 19, 2004 hearing, sheds little light on the question of whether agricultural lands at Island Crossing have long-term commercial significance. While the Board would agree that soils information alone is not determinative, neither is reliance on anecdotal, parcel-focused expression of opinion nor is landowner intent. Instead, to cull from the universe of lands that are “devoted to” agriculture the subset that also has “long term commercial significance” demands an objective, area-wide inquiry that examines locational factors<sup>7</sup> as well as the adequacy of infrastructure to support the agricultural industry. The County errs in its assumption that “long term commercial significance” is determined simply by weighing anecdotal, parcel-specific witness testimony. As explained *infra*, the Board concludes that the County’s reading of the law is incorrect, clearly erroneous,<sup>8</sup> and Respondent therefore fails to carry its burden of proof for the removal of noncompliance and invalidity.

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<sup>5</sup> With respect to the “devoted to” prong of agricultural lands designations, the Supreme Court has clarified: [I]f land owner intent were the controlling factor, local jurisdictions would be powerless to preserve natural resource lands. Presumably in the case of agricultural land, it will always be financially more lucrative to develop such land for uses more intense than agriculture . . . All a land speculator would have to do is buy agricultural land, take it out of production, and ask the controlling jurisdiction to amend its comprehensive plan to remove the “agricultural land” designation.

*City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wash. 2d 38 (1998), at 53.

<sup>6</sup> The Board agrees with CTED’s reading of the guidance that WAC 365-190-050 provides in determining ALLTCS. Just as the Board would defer to the interpretation that the County gives its own words, the Board defers to CTED’s interpretation of the words it adopted pursuant to RCW 36.70A.050.

<sup>7</sup> Many of the criteria listed at WAC 365-190-050 regarding “the possibility of more intense uses of the land” are essentially “locational factors” to be used in this “culling” process. When applying the listed considerations to the facts in the present case, the Board continues to agree with both CTED and The Snohomish County Planning and Development Services Department (PDS) that the Island Crossing triangle includes 75.5 acres of agricultural resource lands of long-term commercial significance, surrounded by a much larger pattern of agricultural resource land and 35.5 acre node of freeway service uses.

<sup>8</sup> The Board has no duty to defer to the County when interpreting the meaning of the words of the statute. The Courts have consistently recognized that statutory interpretation of the GMA is the province of the Boards, not local governments. In 2003, Division I of the Court of Appeals held:

The goals of the Growth Management Act are better served by a consistent interpretation of that Act, and the expertise of the GMA hearings board for interpretation of the GMA is a far more reliable basis for achieving such consistency than are the various counties. . .

*Quadrant v. Central Puget Sound Growth Management Hearings Board*, 119 Wn. App 562, 81 P.3d 918.

In 2001, Division II of the Court of Appeals held:

. . . notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not ‘consistent with the requirements and goals of the GMA.

*Cooper Point Association v. Thurston County*, No. 26425-1-II, 108 Wn. App. 429, 31 P.3d 28 (Wn.App. Div. II, 2001).

The County's reliance on anecdotal, parcel-focused witness testimony as the primary determining factor of LTCS has too narrow a focus - it misses the broad sweep of the Act's natural resource goal, which is to maintain and enhance the agricultural resource *industry*, not simply agricultural operations on individual parcels of land. RCW 36.70A.020(8).<sup>9</sup> This breadth of vision informs a proper reading of the Act's requirements for resource lands designation under .170 and conservation under .060. Reading these provisions as a whole, it is apparent that agricultural lands with "long-term commercial significance" are *area-wide patterns of land use*, not localized parcel ownerships.

Historical or speculative statements by individuals regarding their personal inability to profitably farm certain parcels does not inform a GMA-required inquiry into the *long term commercial significance of area-wide patterns of land use* that are to *assure the maintenance and enhancement of the agricultural land resource base to support the agricultural industry*.<sup>10</sup> By de-designating resource lands based on anecdotal testimony regarding specific parcels (the Island Crossing triangle viewed in isolation),<sup>11</sup> as opposed to the contextual land use pattern of the agricultural lands and industry infrastructure that serves the surrounding Stillaguamish River Valley (*see Findings of Fact 16-18*), the County has committed a clear error.

This view of the meaning of these statutory provisions is consistent both with prior Board and court holdings concerning the purpose, importance, and criteria for designating and conserving resource lands. *See Appendix B*. This reading of the law does not preclude the removal of all designated resource lands from that status. For example, the Board has previously found compliant the removal of agricultural resource lands that had become entirely surrounded by incompatible urban uses.<sup>12</sup> In another case, the Board found compliant the removal of forest resource lands that were no longer supported by necessary industry infrastructure, such as sawmills.<sup>13</sup>

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<sup>9</sup> RCW 36.70A.020(8) provides:

Natural Resource Industries. *Maintain and enhance* natural resource-based *industries*, including productive timber, *agricultural*, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses. Emphasis supplied.

<sup>10</sup> The Supreme Court has underscored the sweep and directiveness of the GMA's agricultural goal: Although the planning goals are not listed in any priority order in the Act, the *verbs of the agricultural provisions mandate specific, direct action. The County has a duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural industry.*

*King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 558; 14 P.3d 133, 141 (2000). Emphasis supplied. *See also* Code Revisor's note following RCW 36.70A.030 - Finding of Intent.

<sup>11</sup> Even the Intervenor observed that when people refer to "Island Crossing," they make reference to a larger area than simply the triangle of land that is the subject of Ordinance No. 04-057. Transcript, at 49.

<sup>12</sup> *Grubb v. Redmond*, Final Decision and Order, CPSGMHB Case No. 00-3-0004, Aug. 11, 2000, (reversed on appeal on other grounds.)

<sup>13</sup> *Alpine v. Kitsap County [Alpine]* coordinated with *Screen v. Kitsap County [Screen]*, Order on Compliance re: Forestry Issues in *Alpine* and Final Decision and Order in *Screen*, CPSGMHB Case Nos. 98-3-0032c and 99-3-0006c, Oct. 9, 1999.

In the present case, the County does not claim that the “Island Crossing triangle” is isolated from an area-wide land use pattern of agricultural resource lands – indeed, these agricultural lands abut no other land use activity, save the small freeway service node that is itself isolated from the existing Arlington UGA.<sup>14</sup> Nor does the County claim that the time for agriculture has passed in the Stillaguamish River Valley because the necessary infrastructure, including food processing plants nearby, has changed. The only evidence in this record supports the contrary conclusion. *See* Findings of Fact 16-17.

Lastly, the Board notes the County’s complaint that the Board did not cite record evidence to support the FDO’s statement that “[i]t is an axiom of land use planning that urban uses at urban densities and intensities inhibit adjacent farm operations.”<sup>15</sup> This axiom is reflected in statutory language of the Act that seeks to protect agricultural uses from more intensive adjacent activities.<sup>16</sup> It is somewhat ironic that part of the County’s rationale for converting agricultural lands at Island Crossing to commercial uses is its assertion that the impact from the businesses in the Freeway Service node has been so serious (*i.e.*, dangerous) that farming on adjacent lands is untenable.<sup>17</sup>

In summary, the Board agrees with Petitioners that the County fails to carry its burden of proof pursuant to RCW 36.70A.320(4) and that the County’s comprehensive plan and development regulations for the Island Crossing triangle continues to not comply with the GMA’s resource lands provisions, specifically RCW 36.70A.020(8) and .040, .060(1), and .170(1)(a).

## 2. Urban Growth Areas

### a. Positions of the Parties

#### Snohomish County and Lane

The County states that its “record now includes a land capacity analysis demonstrating the need to expand the Arlington UGA.” SATC, at 9. The County cites County-wide Planning Policy (CPP) UG-14.d<sup>18</sup> and points to a report prepared by Higa-Burkholder

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<sup>14</sup> The County’s characterization of the node of freeway service uses at Island Crossing as “urban growth” has been consistently rejected by the Board and the Courts. *See* Appendix B.

<sup>15</sup> FDO, at 29.

<sup>16</sup> RCW 36.70A.060(1) provides in relevant part:

Counties and cities shall require that all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feet of, lands designated as agricultural lands, . . . contain a notice that the subject property is within or near designated agricultural lands, . . . on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration.

<sup>17</sup> The Board takes official notice of the Snohomish County Code to observe that the range and intensity of uses allowed in the County’s General Commercial zone is far greater than in the Freeway Service Zone. Logic dictates that the County’s new General Commercial zoning will therefore have a greater impact on the surrounding agricultural lands than is now the case with the impacts from the lesser intensity Freeway Service uses.

<sup>18</sup> CPP UG-14.d provides in relevant part:

Associates (HBA) titled "Buildable Lands Report 2003 Update, City of Arlington UGA, Analysis of Availability of Commercial Parcels and Land Supply" (the **HBA Large Parcel Analysis**). The County explains:

The analysis sought to determine whether there is a shortage of commercial parcels in Arlington's UGA capable of supporting large-scale commercial uses that require frontage on a major arterial and visual access. The analysis concluded that three sites exist within the Arlington UGA that have adequate size and good exposure to major arterials, but that none exist with direct exposure and access to Interstate 5.

SATC, at 11.

The County states that the City of Arlington concurred with the HBA Large Parcel Analysis by adopting Resolution 679 on May 17, 2004, and that after the May 19, 2004 public hearing and May 24, 2004 public hearing, the County Council agreed with the conclusions by adopting Emergency Ordinance 04-057. SATC, at 12. In refuting the suggestion by 1000 Friends that other parcels were also available meeting the criteria adopted in the HBA Large Parcel Analysis, the County argues:

A laundry list of parcels simply cannot compare to the reasoned analysis of the availability of developable properties the Council had before it. The Council reasonably relied on the information before it and the Board cannot substitute its judgment for that of the Council.

*Id.*

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Expansion of the Boundary of an Individual UGA: Expansion of the boundary of an individual UGA to include additional . . . commercial and industrial land shall not be permitted unless it is supported by a land capacity analysis adopted by the County Council pursuant to RCW 36.70A.110 and otherwise complies with the Growth Management Act, . . .

4. For the expansion of the boundary of an individual UGA to include additional commercial or industrial land, the county and the city or cities within the UGA document that commercial or industrial land consumption within the UGA (city plus unincorporated UGA combined) since the start of the twenty-year planning period, equals or exceeds fifty percent of the developable commercial or industrial land supply within the UGA at the start of the planning period. In UGAs where this threshold has not yet been reached, the boundary of an individual UGA may be expanded to include additional commercial or industrial land if the expansion is based on an assessment that concludes that there is a deficiency of larger parcels within that UGA to accommodate the remaining commercial or industrial growth projected for that UGA. Other parcel characteristics determined to be relevant to the assessment of the adequacy of the remaining commercial or industrial land base, as documented in the most recent Snohomish County Growth Monitoring Report or the buildable lands review and evaluation (Building Lands Report), as they may be confirmed or revised based upon any new information presented at public hearings, may also be considered as a basis for expansion of the boundary of an individual UGA to include additional commercial or industrial land.

The County argues that “the Large Parcel Analysis is the type of land capacity analysis contemplated by UG-14, and it complies with the GMA by satisfying the requirements of CPP UG-14, which implements RCW 36.70A.215.” SATC, at 13.

Turning to the UGA locational factors of RCW 36.70A.110, the County also asserts that it is now in compliance. The County states that “the Council reconsidered the locational requirements in light of the entire record and concluded that Island Crossing is adjacent to land characterized by urban growth.” *Id.* Summing up the Council’s reasoning, the SATC states:

As revealed in the proceedings below, sewer service is available to Island Crossing and there are existing commercial uses within Island Crossing. In consideration of the voluminous testimony that Island Crossing is no longer of long-term commercial significance, its adjacency to the City of Arlington, and the existing urban-level uses within Island Crossing, the Council concluded that the Island Crossing triangle meets the Legislature’s locational requirements for a UGA.

*Id.*

#### CTED, 1000 Friends, and SFCD

CTED argues that Ordinance No. 04-057 does not address any of the flaws that the Board found with the County’s UGA designation with Ordinance No. 03-063. CTED begins its attack on the County’s compliance by arguing that the HBA Large Parcel Analysis “does not address the criteria specified in RCW 36.70A.110 and does not exhibit the characteristics of a land capacity analysis under the GMA.” CTED Response, at 17. CTED contends that the criteria used by the HBA Large Parcel Analysis are those that might used by “big-box” stores and automobile dealerships to determine where to locate, rather than those mandated in RCW 36.70A.110. CTED Response, at 18. CTED further alleges that using such criteria for large-scale commercial development would favor development in less expensive rural areas or in strip development along freeways and major arterials, in contravention of the Act’s goals favoring compact urban development. *Id.*

1000 Friends agrees with CTED that Ordinance No. 04-057 does not meet the locational criteria of RCW 36.70A.110 and questions the objectivity, and therefore the credibility of the HBA Large Parcel Analysis. 1000 Friends points out that the report was paid for by consultants hired by Mr. Lane, and opines that the consultant’s motivation “is not dispassionate, but is to get Mr. Lane his redesignation.” *Id.* 1000 Friends also takes issue with the validity of the analysis, arguing:

The biggest problem is that it [the analysis] is based on Scenario B of the County’s Buildable Lands Report. Scenario B does not use the population and employment targets that were adopted by the County. Consequently,

any analysis based on Scenario B cannot by definition comply with the GMA.

1000 Friends Response, at 7.

1000 Friends also disputes the accuracy of the report relative to availability of large lots in the Arlington UGA and complains that it does not examine the possibility of rezoning additional large lots to commercial designations. *Id.*

SFCD agrees with 1000 Friends that the HBA Large Lot Analysis is suspect because it was prepared by Mr. Lane's consultant, and argues that it therefore should be discounted as merely an expression of landowner intent. SFCD Response, at 7. SFCD also argues that the County's Department of Planning and Development Services does not support the Burkholder "updates." *Id.*

#### **b. Board Analysis**

It is a close question whether the HBA Large Lot Parcel Analysis is consistent with the entirety of UG-14(d). There appears to be no dispute on the question of whether the 50% threshold named in UG-14(d) has been exceeded, and no argument was presented that the County must conduct its re-evaluation and adjustments in the context of a county-wide review of capacity and need. While the petitioners raise questions about the methodology and assumptions of the analysis, the Board is inclined to agree that the HBA Large Parcel Analysis cures the County's inconsistency with CPP UG-14(d) and thereby cures the noncompliance with RCW 36.70A.215.

However, achieving consistency between Ordinance 04-057 and CPP UG-14(d), does not cure the County's noncompliance with RCW 36.70A.110 because it does not address the "UGA location" deficiencies identified in the FDO. The "summary" of the County's reasoning (SATC, at 13, ln. 13-20) simply reiterates the arguments that the Board rejected in the FDO. No new facts or reasoning are presented to disturb the Board's conclusions that Island Crossing continues to have agricultural lands of long-term commercial significance, that the presence of a sewer line is irrelevant, particularly given its limitations,<sup>19</sup> that the freeway service uses do not rise to the status of "urban growth,"<sup>20</sup> and that Island Crossing is not "adjacent" to the Arlington UGA or a

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<sup>19</sup> No new evidence or persuasive argument was presented to the Board to undercut the Court of Appeals' 2001 conclusion that:

The only urban development permits issued for Island Crossing are for the area that serves the freeway. Further, the substantial shoreline development permit for sewer service in the freeway area explicitly 'prohibits any service tie-ins outside the Freeway Service Area.' Thus, adequate public facilities and services do not currently exist.

*Lane v. Central Puget Sound Growth Management Hearings Board*, 2001 WL 244384 (Wash. App. Div. I, Mr. 12, 2001). See Appendix B.

<sup>20</sup> No new evidence or persuasive argument was presented to the Board to undercut the Superior Court's 1997 conclusion that "An isolated special purpose freeway service node does not constitute generalized urban growth." See Appendix B.

residential “population” of any sort.<sup>21</sup> In fact, the private lands within this proposed UGA expansion would be connected to the Arlington UGA only by means of a 700 foot long ‘cherry stem’ consisting of nothing but public right-of-way. Findings of Fact Nos. 11 and 13. While such dramatically irregular boundaries were common in the pre-GMA era, the meaning of “adjacency” under the GMA precludes such behavior.

Even if the HBA Large Parcels Report and CPP UG-14 compels the County to attempt to expand Arlington’s UGA, it is significant to recognize that such expansion is a self-imposed, rather than statutorily compelled, duty. Therefore, the County cannot point to UG-14 as justification for Ordinance No. 04-057. Specifically on point, the Supreme Court has held that a CPP that “mandates” the inclusion of specific lands within a UGA cannot trump the statutory requirements of RCW 36.70A.110.

We conclude that a comprehensive plan provision is not immune from challenge merely because the County was required to adopt the provision by its CPPs . . . There is no statutory language immunizing provisions of the comprehensive plan from review on the grounds that those provisions are mandated by the CPPs. *A UGA designation that blatantly violates GMA requirements should not stand simply because CPPs mandated its adoption.*

*King County v. Central Puget Sound Growth Management Hearings Board*, 138 Wn.2d 161, 176-177; 979 P.2d 372, 382 (1999). Emphasis supplied.

Here, the Board has determined, *supra*, that Ordinance No. 04-057 does not comply with the statutory requirements for resource lands and urban growth areas. Therefore, an argument that UG-14 somehow compels the inclusion of Island Crossing in the Arlington UGA is unavailing.

The Board concludes that Snohomish County has not carried its burden of proof in its attempt to overcome the finding of invalidity and noncompliance in the FDO, particularly with regard to RCW 36.70A.020(1) and (2), RCW 36.70A.040, and RCW 36.70A.110. The Board remains convinced that the County’s reading of these areas of the law is in error, clearly erroneous.<sup>22</sup>

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<sup>21</sup> This point is even more apparent when the “Island Crossing triangle” is considered in context to the geography and topography of the area. It sits in the flood plain of the Stillaguamish River, suffering from the same damaging floods that occur every three to five years throughout the basin. Findings of Fact Nos. 7 and 8. Unsurprisingly, the elevation of Island Crossing is at essentially the same elevation as designated agricultural resource lands to the west, north and east, whereas the existing Arlington UGA to the south is on higher ground. Finding of Fact 18.

<sup>22</sup> The Board also notes that, in addition to failing to comply with the locational requirements of RCW 36.70A.110, the inclusion of the Island Crossing triangle within the UGA would create an impermissible conflict with RCW 36.70A:060(4). The County admits that it has not “enacted a program authorizing transfer or purchase of development rights” of designated agricultural resource lands within urban growth areas. Transcript, at 57. Since the Board has found, *supra*, that the de-designation of 75.5 acres of agricultural resource lands in the Island Crossing triangle is noncompliant, and invalid, and since the

## **VI. CONCLUSIONS OF LAW**

### **A. Noncompliance and Invalidity**

Based on the analysis in Section V *supra*, the Board concludes that Snohomish County's comprehensive plan and development regulations for the Island Crossing Area continues not to comply with the goals and requirements of the GMA, specifically RCW 36.70A.020(1), (2), (8), and (10) and RCW 36.70A.040, RCW 36.70A.060(1), RCW 36.70A.110, and RCW 36.70A.170(1)(a), respectively. Therefore, **the Board will enter a Finding of Continuing Noncompliance and Continuing Invalidity.**

### **B. Sanctions**

Because the Board finds Snohomish County in continuing noncompliance with the GMA, RCW 36.70A.330(3) directs that these findings be transmitted to the Governor. Significantly, Ordinance No. 04-057 represents Snohomish County's **third** attempt under the GMA (and second attempt within the past nine months)<sup>23</sup> to convert Island Crossing from a part of the designated agricultural resource lands of the Stillaguamish River Valley into Arlington's urban growth area. It has done so notwithstanding consistent contrary readings of the Growth Management Act by the Snohomish County SEPA Responsible Official,<sup>24</sup> Snohomish County Executive,<sup>25</sup> the Growth Management Hearings Board,<sup>26</sup> Snohomish County Superior Court,<sup>27</sup> the First Division of the Washington State Court of Appeals,<sup>28</sup> and the Governor of the State of Washington.<sup>29</sup>

By its actions, the County Council has evidenced an ongoing unwillingness to comply with those portions of the Growth Management Act with which it disagrees. Therefore, the Board will recommend to the Governor that he impose financial sanctions authorized by RCW 36.70A.340. The Board will further recommend that any sanctions be lifted only when Snohomish County provides sufficient assurance that it will take no further legislative action contrary to the GMA, as interpreted by the Board in this matter, unless the Board's holdings are reversed by a court of competent jurisdiction.

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County admits that it has no transfer of development rights program pursuant to RCW 36.70A.060(4), Snohomish County is further barred from including this 75.5 acres of land within the UGA.

<sup>23</sup> Ordinance No. 03-063 was adopted on September 10, 2003, FDO, Finding of Fact 1; Ordinance No. 04-057 was adopted May 24, 2004. Finding of Fact 2.

<sup>24</sup> PDS Report, Index of Record No. 21, and DSEIS for Dwayne Lane Docket Proposal, Index of Record No. 22, at 2-36.

<sup>25</sup> Executive Veto Message re: Dwayne Lane Docket Proposal, Index of Record No. 1114.

<sup>26</sup> CPSGMHB Case No. 98-3-0033c, *Lane, et al., v. Snohomish County*, Order Granting Motion to Dismiss [Lane], Jan. 20, 1999; and CPSGMHB Case No. 03-3-0019c, *1000 Friends v. Snohomish County*, FDO, March 22, 2004.

<sup>27</sup> Snohomish Superior Court Case No. 96-2-03675-5, Nov. 19, 1997. See Appendix B.

<sup>28</sup> *Lane v. Central Puget Sound Growth Management Hearings Board*, 2001 WL 244384 (Wash. App. Div. I, Mar. 12, 2001). See Appendix B.

<sup>29</sup> CTED Petition for Review, attached letter from Governor Gary Locke.

The Board recognizes that the Governor will decide whether to impose sanctions and, if so, which to choose from among those listed at RCW 36.70A.340. The Governor likewise will decide the circumstances under which any imposed sanctions will be lifted and when further proceedings before the Board are necessary and appropriate.

## VII. ORDER

Having reviewed and considered the above-referenced documents, the goals and requirements of the Growth Management Act, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

- 1) Snohomish County has **failed to carry its burden of proof** to justify a Board finding of compliance and rescission of invalidity. Snohomish County's adoption of Ordinance No. 04-057 **does not comply** with the requirements of RCW 36.70A.040, .060, .110, .170, and **was not guided by** RCW 36.70A.020 (1), (2), (8) and (10); the County's action was **clearly erroneous**.
- 2) Because the continued validity of Ordinance No. 04-057 would substantially interfere with the fulfillment of RCW 36.70A.020 (1), (2), (8) and (10), the Board also enters a **determination of invalidity** for Ordinance No. 04-057.
- 3) A copy of this Order shall be transmitted to the Governor together with a letter recommending the imposition of financial sanctions pursuant to RCW 36.70A.340. The parties to this case shall be copied on the letter to the Governor.
- 4) At such time as the Governor so indicates, or a court directs, the Board shall notify the parties to this case of a schedule for further compliance proceedings.

So ORDERED this 24th day of June 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Bruce C. Laing, FAICP  
Board Member

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Edward G. McGuire, AICP  
Board Member

Note: Mr. McGuire files a concurring opinion below

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Joseph W. Tovar, FAICP  
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300. Any party wishing to file a motion for reconsideration of this final order must do so within ten days of service of this order. WAC 242-02-830(1). Any party wishing to appeal this final order to superior court must do so within thirty days of service of this order. WAC 242-02-898.

### **Concurring Opinion of Board Member McGuire**

I concur with the conclusions of my colleagues as expressed in this Order, save one. I would have addressed Legal Issue 5, pertaining to the Ordinance's compliance with the GMA's critical areas requirements for frequently flooded areas. Legal Issue 5 states:

By expanding the Arlington UGA into a frequently flooded area and by redesignating lands within that area for commercial use, is Snohomish County Amended Ordinance No. 03-063 in noncompliance with RCW 36.70A.060 and RCW 36.70A.170?

*See Corrected FDO, at 37.*

I agree with the County's assertion that: 1) it has identified and designated critical areas, including frequently flooded areas, as required by RCW 36.70A.170; and 2) it has adopted critical areas development regulations intended to protect those critical areas, including frequently flooded areas. County Response, at 4-6. Intervenor Lane even acknowledges that "[N]o development will be allowed in Island Crossing that is not required to meet all critical areas regulations, including requirements for mitigation." Lane Response, at 30.

However, the direction provided in Ordinance No. 04-057's<sup>30</sup> Findings undermine the importance of meeting the County's own critical areas mitigation requirements. Several Findings speak to mitigation:

- In Ex. 135, *applicant* of the Island Crossing Interchange Docket Proposal states various development techniques and plans which will be *voluntarily used to minimize the prospect of flood impacts*. . . . See Ordinance No. 04-057, Section 1, B.9.AA; and Finding of Fact 4, (emphasis supplied).
- After the effective date of Emergency Ordinance No. 04-057, *development in the Island Crossing Interchange Docket Proposal area added to the Arlington UGA by Emergency Ordinance No. 04-057 should be conditioned upon use of the flood protection measures outlined above in finding AA of Section 1, provided such flood protection measures are technically feasible and do not defeat the purpose of the development*. See Ordinance No. 04-057, Section 3, (emphasis supplied).

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<sup>30</sup> Ordinance No. 03-063 was the subject of the Board's FDO; however, Ordinance No. 03-063, Section 1, Finding V, is virtually the same as Finding B.9.AA quoted *supra*. Likewise, Ordinance No. 03-063, Section 3, contains the same language as Section 3 quoted *supra*.

These statements draw me to conclude that notwithstanding the actual mitigation requirements of the County's critical areas development regulations, the Ordinance directs that this proposal will be voluntarily mitigated by the applicant to the extent needed flood protection measures are technically feasible and do not defeat the purpose of the development. If this is the extent of protection the County provides for frequently flooded areas - voluntarily determined by the applicant - I would find **noncompliance with RCW 36.70A.060(2)**.

## Appendix A

### PROCEDURAL HISTORY PRECEDING FINAL DECISION AND ORDER

On October 23, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (PFR) from 1000 Friends of Washington, Stillaguamish Flood Control District (SFCD), Agriculture for Tomorrow, and Pilchuck Audubon Society (collectively, **Petitioners** or **1000 Friends**) and "Request for Expedited Review." Petitioners challenge the adoption by Snohomish County (the **County** or **Snohomish**) of Amended Ordinance No. 03-063.

The basis for the challenge is alleged noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**). The matter was assigned Case No. 03-3-0019 and is hereafter referred to as *1000 Friends, et al., v. Snohomish County*. Board member Joseph W. Tovar is the Presiding Officer for this matter.

On October 28, 2003, the Board issued the "Notice of Hearing" in this matter.

On November 5, 2003, the Board received "Snohomish County's Response to Petitioners' Request for Expedited Review." Also on this date, the Board received from Dwayne Lane a "Motion for Status as Intervenor" (the **Dwayne Lane Motion to Intervene**) in Case No. 03-3-0019 and a draft "Order Granting Motion for Status as Intervenor." Also on this date, the Board received a PFR from "The Director of the State of Washington Department of Community, Trade, and Economic Development" (the **CTED II PFR**) challenging the adoption of Snohomish County Ordinances Nos. 03-063 and 03-104, together with a "Motion to Consolidate" (the **CTED Motion to Consolidate**) with Cases Nos. 03-3-0017 and 03-3-0019. The CTED II PFR case was assigned Case No. 03-3-0020 and the case was titled *CTED v. Snohomish County [II]*.

On November 6, 2003, beginning at 10:00 a.m., the Board conducted the prehearing conference in the training room on the 24<sup>th</sup> floor of the Bank of California Building, 900 Fourth Avenue in Snohomish. At the prehearing conference, the presiding officer orally granted the portion of the CTED Motion to Consolidate that includes issues addressed to Snohomish Ordinance No. 03-063. He indicated that the legal issues addressed to Snohomish Ordinance No. 104 would not be consolidated with Case No. 03-3-0019, but would be referred to Mr. McGuire, the presiding officer in Case No. 03-3-0017. The presiding officer also orally granted the motion by Dwayne Lane to intervene in the consolidated 1000 Friends and CTED challenges to Snohomish Ordinance No. 03-063.

On November 10, 2003, the Board received "Snohomish County-Camano Association of Realtors and Master Builders Association of King and Snohomish Counties' Joint Opposition to CTED's Motion to Consolidate." The caption of this pleading listed both Case No. 03-3-0017 (CTED I) and Case No. 03-3-0020 (CTED II).

On November 12, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued "Prehearing Order, Order Partially Granting Motion for

Consolidation, and Order Granting Motion for Intervention” (the **PHO**) in the above captioned matter. The PHO set the Final Schedule for the submittal of motions and briefs. PHO, at 4-5. Later on this same date, the Board received from Petitioner 1000 Friends a letter (the **1000 Friends letter**) attached to which were: (1) a City of Arlington Development Services “City Council Agenda Bill” with a Council Meeting Date of September 17, 2003 and the subject heading caption “Consideration of Intention of Annexation 10% Petition for Island Crossing Annexation (File No. A-03-068)” and (2) a memorandum, dated September 7, 2003, from Cliff Strong, Arlington Planning Manager to the Mayor and City Council.

On November 13, 2003, the Board received from the County a letter (the **County letter**) responding to the 1000 Friends letter.

On November 14, 2003, the Board received “Snohomish County’s Index to the Record” (the **County’s Index**). Later on this same date, the presiding officer directed Susannah Karlsson, the Board’s Administrative Officer, to contact the parties to the case for the purpose of setting up a telephone conference call to hear oral argument regarding the 1000 Friends letter and the County letter on Tuesday, November 18, 2003 commencing at 9 a.m.

On November 18, 2003, the Board conducted a telephonic conference call to hear argument regarding the 1000 Friends letter and the County letter. Participating for the Board were Bruce C. Laing and Joseph W. Tovar, presiding officer. Participating for 1000 Friends was John T. Zilavy, for the County was Andrew S. Lane, for Stillaguamish were Henry Lippek and Ashley E. Evans, for Intervenor Dwayne Lane was Todd C. Nichols, and for the Washington State Department of Community, Trade and Economic Development was Alan D. Copsey.

On November 24, 2003, the Board issued “Order Granting Motion to Supplement the Record” (the **First Order on Motions**). The First Order Granting Supplementation admitted to the record before the Board two supplemental exhibits and assigned them exhibit numbers Supp. Ex. 1 and Supp. Ex. 2.

On December 4, 2003, the Board received “1000 Friends’ Motion to Correct the Record and Index of Record” (the **1000 Friends Motion**) with proposed supplemental exhibits A, B, and C.

On December 5, 2003, the Board received “Flood Control District’s Motion to Correct the Record and Index of the Record,” (the **Stillaguamish Motion**) with proposed supplemental exhibits A and B.

On December 12, 2003, the Board received “Snohomish County’s Response to Motions to Supplement the Record” (the **County Response**) with Attachments A, B and C. On this same date the Board received “Dwayne Lane’s Memorandum in Opposition to Correct the Record and Index of Record” (the **Lane Memorandum**) together with the

“Declaration of Dwayne Lane Re: Motions to Correct or Supplement the Record” (the **Lane Declaration**).

On December 18, 2003, the Board received “Petitioners’ Reply to Motion to Correct the Record and Index of Record” (the **1000 Friends Reply**).

On December 19, 2003, the Board received “Flood District’s Reply to Dwayne Lane and Snohomish County’s Responses to Motion to Correct the Record and Index of Record” (the **Flood District Reply**).

On January 2, 2004, the Board issued “Second Order on Motions” (the **Second Order on Motions**).

On January 9, 2004, the Board received the “Petitioner Stillaguamish Flood Control District’s Prehearing Brief” (the **Flood District PHB**) “1000 Friends of Washington Opening Brief” (the **1000 Friends’ Opening Brief**); and “CTED’s Opening Brief” (the **CTED Opening Brief**).

On January 23, 2004, the Board received “Snohomish County’s Response Brief” (the **County Response**) and “Intervenor Lane’s Hearing Response Memorandum” (the **Lane Response**) and “Intervenor Lane’s Motion to Supplement the Record” (the **Lane January 23, 2004 Motion to Supplement**).

On January 29, 2004, the Board received “Flood District’s Reply Brief” (the **Flood District Reply**), and “CTED’s Reply Brief” (the **CTED Reply**).

On January 30, 2004, the Board received “1000 Friends of Washington, Agriculture for Tomorrow, and Pilchuck Audubon Society Reply Brief” (the **1000 Friends Reply**).

The Board conducted the Hearing on the Merits (the **HOM**) in this matter on February 2, 2004 in the conference room adjacent to the Board’s office, Suite 2470, 900 Fourth Avenue in Seattle. Present for the Board were Edward G. McGuire, Bruce C. Laing, and Joseph W. Tovar, presiding officer. Also present were the Board’s legal externs Ketil Freeman and Lara Heisler. Court reporting services were provided by Scott Kindle of Mills and Lessard, Seattle. The parties were represented as follows: for 1000 Friends was John T. Zilavy; for Stillaguamish Flood Control District were Henry Lippek and Ashley Evans; for CTED was Alan D. Copsy; for the County was Andrew S. Lane; and for Intervenor Dwayne Lane was Todd C. Nichols. No witnesses testified. At the conclusion of the HOM, the presiding officer directed that a transcript (the **HOM Transcript**) be prepared.

On February 11, 2004, the Board received a letter from counsel for the County indicating that “Snohomish County will not be submitting a post-hearing rebuttal to 1000 Friends’ late reply brief.”

On February 13, 2004, the Board received "Intervenor Lane's Surrebuttal Memorandum" (the **Lane Surrebuttal**).

On March 18, 2004, the Board received "1000 Friends of Washington, Agriculture for Tomorrow, and Pilchuck Audubon Society Motion to Supplement the Record" (the **1000 Friends March 18, 2004 Motion to Supplement**). Later on this same date, the Board received "Respondent Snohomish County's Response to 1000 Friends' Motion to Supplement the Record" (the **County Response to the 1000 Friends March 18, 2004 Motion to Supplement**).

On March 19, 2004, the presiding officer directed the Board's Administrative Officer Susannah Karlsson to contact the parties to ask if they wished to file any response to the 1000 Friends March 18, 2004 Motion to Supplement. She made telephone contact with all parties. Later on this same date, the Board received "Intervenor Dwayne Lane's Response to 1000 Friends' Motion to Supplement the Record" (the **Lane Response to the 1000 Friends March 18, 2004 Motion to Supplement**) and correspondence from counsel for the Stillaguamish Flood Control District (the **Flood District Letter**).

## Appendix B

### HISTORY OF GMA LITIGATION RE: ISLAND CROSSING<sup>31</sup>

1. Among the seventy issues challenging the GMA compliance of Snohomish County's first comprehensive plan in 1996 was an allegation by Pilchuck Audubon Society that the County had violated the agricultural resource lands provisions of the Growth Management Act in removing from resource lands designation lands in the Island Crossing Area. The Board upheld the County's action. CPSGMHB, *Sky Valley, et al., v. Snohomish County*, Final Decision and Order, Case No. 96-3-0068c, April 15, 1996.
2. On November 19, 1997, Snohomish County Superior Court, in reviewing the Board's decision in *Sky Valley v. Snohomish County*, issued a "Judgment Affirming in Part and Remanding in Part," Superior Court Case No. 96-2-03675-5.
3. In an oral decision incorporated by the Court into the Judgment Affirming in Part and Remanding in Part, the Superior Court stated:

Evidence and arguments supporting de-designation were presented by [the City of Arlington] . . . focused almost exclusively on issues relating to the City of Arlington's economic growth and well-being, and not on Growth Management Act Criteria. . . . An isolated special purpose freeway service node does not constitute generalized urban growth . . . What happened to the fundamental axiom of the Growth Management Act that "the land speaks first"? Where does the Act state that the economic welfare of cities speaks first? Where does the evidence submitted by Arlington even reference the agricultural productivity or the floodplain status of the lands which are not proposed for automobile dealerships? Freeways are no longer longitudinal strips of urban opportunity. Agricultural lands must be conserved as a first priority, and urban centers must be compact, separate and distinct features of the remaining part of the landscape.

*Id.*, Transcript of Proceedings, Court's Oral Ruling, at 14-18.

4. The Superior Court remanded the *Sky Valley* matter to the Board, finding no substantial evidence to support the removal of the agricultural designation. PDS Report, at 4.
5. Subsequent to the Superior Court remand, the Snohomish County Planning Commission and County Council reconsidered the land use designations for Island Crossing in 1998 and redesignated the agricultural areas as agricultural and

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<sup>31</sup> This history was set forth in the FDO, at 2-3.

redesignated the commercial area as Rural Freeway Service, and removed Island Crossing from the Arlington UGA.

*Id.*

6. Dwayne Lane, the owner of 15 acres of land bordering Interstate 5 in Island Crossing, challenged the County's designation of Island Crossing as agricultural resource land and filed a petition for review with the Growth Management Hearings Board. The Board rejected Lane's appeal. CPSGMHB Case No. 98-3-0033c, *Lane, et al., v. Snohomish County*, Order Granting Motion to Dismiss [Lane]. Jan. 20, 1999.
7. Snohomish County Superior Court affirmed the Board's January 20, 1999 Order, after which Lane appealed to the Court of Appeals. *Lane v. Central Puget Sound Growth Management Hearings Board*, 2001 WL 244384 (Wash. App. Div. I, Mar. 12, 2001).
8. The Court of Appeals described the Island Crossing area as follows:

Island Crossing is composed of prime agricultural soils and has been described as having agricultural value of primary significance. Except for the County's 1995 dedesignation of Island Crossing as agricultural land, Island Crossing has been designated and zoned agricultural since 1978. Thus, the record supports a finding that Island Crossing is capable of being used for agricultural production. *See City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 53, 959 P.2d 1091 (1998).

Although Island Crossing borders the interchange of Interstate 5 and State Road 530, it is separated from Arlington by farmland. Indeed, the record contains evidence to indicate that most of the land in Island Crossing is being actively farmed, except a small area devoted to freeway services. Thus, the record indicates that the land is actually used for agricultural production. *See City of Redmond*, 136 Wn.2d at 53. The only urban development permits issued for Island Crossing are for the area that serves the freeway. Further, the substantial shoreline development permit for sewer service in the freeway area explicitly 'prohibits any service tie-ins outside the Freeway Service Area.' Thus, adequate public facilities and services do not currently exist. *Id.*

FDO, at 2-3.

## Chapter 34.05 RCW

# Administrative Procedure Act

### **34.05.510 Relationship between this chapter and other judicial review authority.**

This chapter establishes the exclusive means of judicial review of agency action, except:

(1) The provisions of this chapter for judicial review do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(2) Ancillary procedural matters before the reviewing court, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of privileged or confidential material, are governed, to the extent not inconsistent with this chapter, by court rule.

(3) To the extent that de novo review or jury trial review of agency action is expressly authorized by provision of law.

[1988 c 288 § 501.]

### **34.05.570 Judicial review.**

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

(i) Unconstitutional;

(ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;

(iii) Arbitrary or capricious; or

(iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

[2004 c 30 § 1; 1995 c 403 § 802; 1989 c 175 § 27; 1988 c 288 § 516; 1977 ex.s. c 52 § 1; 1967 c 237 § 6; 1959 c 234 § 13. Formerly RCW 34.04.130.]

**Notes:**

**Findings—Short title—Intent—1995 c 403:** See note following RCW 34.05.328.

**Part headings not law—Severability—1995 c 403:** See RCW 43.05.903 and 43.05.904.

**Effective date—1989 c 175:** See note following RCW 34.05.010.

## Chapter 36.70A RCW

# Growth Management—Planning by Selected Counties and Cities

### **36.70A.020 Planning goals.**

The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

(3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.

(4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.

(5) Economic development. Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of

the state's natural resources, public services, and public facilities.

(6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

(7) Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.

(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

(9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

(11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and

use without decreasing current service levels below locally established minimum standards.

(13) Historic preservation. Identify and encourage the preservation of lands, sites, and structures, that have historical or archaeological significance.

[2002 c 154 § 1; 1990 1st ex.s. c 17 § 2.]

**36.70A.040 Who must plan—  
Summary of requirements—  
Development regulations must  
implement comprehensive plans.**

(1) Each county that has both a population of fifty thousand or more and, until May 16, 1995, has had its population increase by more than ten percent in the previous ten years or, on or after May 16, 1995, has had its population increase by more than seventeen percent in the previous ten years, and the cities located within such county, and any other county regardless of its population that has had its population increase by more than twenty percent in the previous ten years, and the cities located within such county, shall conform with all of the requirements of this chapter. However, the county legislative authority of such a county with a population of less than fifty thousand population may adopt a resolution removing the county, and the cities located within the county, from the requirements of adopting comprehensive land use plans and development regulations under this chapter if this resolution is adopted and filed with the department by December 31, 1990, for counties initially meeting this set of criteria, or within sixty days of the date the office of financial management certifies that a county meets this set of criteria under subsection (5) of this section. For the purposes of this subsection, a county not currently planning under this chapter is not required to include in its population count those persons confined in a correctional facility under the jurisdiction of the department of corrections that is located in the county.

Once a county meets either of these sets of criteria, the requirement to conform with all of the requirements of this chapter remains in

effect, even if the county no longer meets one of these sets of criteria.

(2) The county legislative authority of any county that does not meet either of the sets of criteria established under subsection (1) of this section may adopt a resolution indicating its intention to have subsection (1) of this section apply to the county. Each city, located in a county that chooses to plan under this subsection, shall conform with all of the requirements of this chapter. Once such a resolution has been adopted, the county and the cities located within the county remain subject to all of the requirements of this chapter.

(3) Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a county-wide planning policy under RCW 36.70A.210; (b) the county and each city located within the county shall designate critical areas, agricultural lands, forest lands, and mineral resource lands, and adopt development regulations conserving these designated agricultural lands, forest lands, and mineral resource lands and protecting these designated critical areas, under RCW 36.70A.170 and 36.70A.060; (c) the county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; (d) if the county has a population of fifty thousand or more, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan on or before July 1, 1994, and if the county has a population of less than fifty thousand, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan by January 1, 1995, but if the governor makes written findings that a county with a population of less than fifty thousand or a city located within such a county is not making reasonable progress toward

adopting a comprehensive plan and development regulations the governor may reduce this deadline for such actions to be taken by no more than one hundred eighty days. Any county or city subject to this subsection may obtain an additional six months before it is required to have adopted its development regulations by submitting a letter notifying the department of community, trade, and economic development of its need prior to the deadline for adopting both a comprehensive plan and development regulations.

(4) Any county or city that is required to conform with all the requirements of this chapter, as a result of the county legislative authority adopting its resolution of intention under subsection (2) of this section, shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a county-wide planning policy under RCW 36.70A.210; (b) the county and each city that is located within the county shall adopt development regulations conserving agricultural lands, forest lands, and mineral resource lands it designated under RCW 36.70A.060 within one year of the date the county legislative authority adopts its resolution of intention; (c) the county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; and (d) the county and each city that is located within the county shall adopt a comprehensive plan and development regulations that are consistent with and implement the comprehensive plan not later than four years from the date the county legislative authority adopts its resolution of intention, but a county or city may obtain an additional six months before it is required to have adopted its development regulations by submitting a letter notifying the department of community, trade, and economic development of its need prior to the deadline for adopting both a comprehensive plan and development regulations.

(5) If the office of financial management certifies that the population of a county that previously had not been required to plan under

subsection (1) or (2) of this section has changed sufficiently to meet either of the sets of criteria specified under subsection (1) of this section, and where applicable, the county legislative authority has not adopted a resolution removing the county from these requirements as provided in subsection (1) of this section, the county and each city within such county shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a county-wide planning policy under RCW 36.70A.210; (b) the county and each city located within the county shall adopt development regulations under RCW 36.70A.060 conserving agricultural lands, forest lands, and mineral resource lands it designated within one year of the certification by the office of financial management; (c) the county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; and (d) the county and each city located within the county shall adopt a comprehensive land use plan and development regulations that are consistent with and implement the comprehensive plan within four years of the certification by the office of financial management, but a county or city may obtain an additional six months before it is required to have adopted its development regulations by submitting a letter notifying the department of community, trade, and economic development of its need prior to the deadline for adopting both a comprehensive plan and development regulations.

(6) A copy of each document that is required under this section shall be submitted to the department at the time of its adoption.

(7) Cities and counties planning under this chapter must amend the transportation element of the comprehensive plan to be in compliance with this chapter and chapter 47.80 RCW no later than December 31, 2000.

[2000 c 36 § 1; 1998 c 171 § 1; 1995 c 400 § 1; 1993 sp.s. c 6 § 1; 1990 1st ex.s. c 17 § 4.]

**Notes:**

**Effective date—1995 c 400:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public

institutions, and shall take effect immediately [May 16, 1995]." [1995 c 400 § 6.]

**Effective date—1993 sp.s. c 6:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect June 1, 1993." [1993 sp.s. c 6 § 7.]

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### **36.70A.060 Natural resource lands and critical areas—Development regulations.**

(1)(a) Except as provided in \*RCW 36.70A.1701, each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. Regulations adopted under this subsection may not prohibit uses legally existing on any parcel prior to their adoption and shall remain in effect until the county or city adopts development regulations pursuant to RCW 36.70A.040. Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals.

(b) Counties and cities shall require that all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feet of, lands designated as agricultural lands, forest lands, or mineral resource lands, contain a notice that the subject property is within or near designated agricultural lands, forest lands, or mineral resource lands on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration. The notice for mineral resource lands shall also inform that an application might be made for mining-

related activities, including mining, extraction, washing, crushing, stockpiling, blasting, transporting, and recycling of minerals.

(2) Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170. For counties and cities that are required or choose to plan under RCW 36.70A.040, such development regulations shall be adopted on or before September 1, 1991. For the remainder of the counties and cities, such development regulations shall be adopted on or before March 1, 1992.

(3) Such counties and cities shall review these designations and development regulations when adopting their comprehensive plans under RCW 36.70A.040 and implementing development regulations under RCW 36.70A.120 and may alter such designations and development regulations to insure consistency.

(4) Forest land and agricultural land located within urban growth areas shall not be designated by a county or city as forest land or agricultural land of long-term commercial significance under RCW 36.70A.170 unless the city or county has enacted a program authorizing transfer or purchase of development rights.

[2005 c 423 § 3; 1998 c 286 § 5; 1991 sp.s. c 32 § 21; 1990 1st ex.s. c 17 § 6.]

**Notes:**

\*Reviser's note: RCW 36.70A.1701 expired June 30, 2006.

**Intent—Effective date—2005 c 423:** See notes following RCW 36.70A.030.

### **36.70A.070 Comprehensive plans—Mandatory elements.**

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be

adopted and amended with public participation as provided in RCW 36.70A.140.

Each comprehensive plan shall include a plan, scheme, or design for each of the following:

(1) A land use element designating the proposed general distribution and general location and extent of the uses of land, where appropriate, for agriculture, timber production, housing, commerce, industry, recreation, open spaces, general aviation airports, public utilities, public facilities, and other land uses. The land use element shall include population densities, building intensities, and estimates of future population growth. The land use element shall provide for protection of the quality and quantity of ground water used for public water supplies. Wherever possible, the land use element should consider utilizing urban planning approaches that promote physical activity. Where applicable, the land use element shall review drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound.

(2) A housing element ensuring the vitality and character of established residential neighborhoods that: (a) Includes an inventory and analysis of existing and projected housing needs that identifies the number of housing units necessary to manage projected growth; (b) includes a statement of goals, policies, objectives, and mandatory provisions for the preservation, improvement, and development of housing, including single-family residences; (c) identifies sufficient land for housing, including, but not limited to, government-assisted housing, housing for low-income families, manufactured housing, multifamily housing, and group homes and foster care facilities; and (d) makes adequate provisions for existing and projected needs of all economic segments of the community.

(3) A capital facilities plan element consisting of: (a) An inventory of existing capital facilities owned by public entities,

showing the locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities; (d) at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes; and (e) a requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities plan element are coordinated and consistent. Park and recreation facilities shall be included in the capital facilities plan element.

(4) A utilities element consisting of the general location, proposed location, and capacity of all existing and proposed utilities, including, but not limited to, electrical lines, telecommunication lines, and natural gas lines.

(5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The following provisions shall apply to the rural element:

(a) Growth management act goals and local circumstances. Because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter.

(b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban

growth and that are consistent with rural character.

(c) Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by:

(i) Containing or otherwise controlling rural development;

(ii) Assuring visual compatibility of rural development with the surrounding rural area;

(iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;

(iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and ground water resources; and

(v) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.

(d) Limited areas of more intensive rural development. Subject to the requirements of this subsection and except as otherwise specifically provided in this subsection (5)(d), the rural element may allow for limited areas of more intensive rural development, including necessary public facilities and public services to serve the limited area as follows:

(i) Rural development consisting of the infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas, whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments.

(A) A commercial, industrial, residential, shoreline, or mixed-use area shall be subject to the requirements of (d)(iv) of this subsection, but shall not be subject to the requirements of (c)(ii) and (iii) of this subsection.

(B) Any development or redevelopment other than an industrial area or an industrial use within a mixed-use area or an industrial area under this subsection (5)(d)(i) must be principally designed to serve the existing and projected rural population.

(C) Any development or redevelopment in terms of building size, scale, use, or intensity

shall be consistent with the character of the existing areas. Development and redevelopment may include changes in use from vacant land or a previously existing use so long as the new use conforms to the requirements of this subsection (5);

(ii) The intensification of development on lots containing, or new development of, small-scale recreational or tourist uses, including commercial facilities to serve those recreational or tourist uses, that rely on a rural location and setting, but that do not include new residential development. A small-scale recreation or tourist use is not required to be principally designed to serve the existing and projected rural population. Public services and public facilities shall be limited to those necessary to serve the recreation or tourist use and shall be provided in a manner that does not permit low-density sprawl;

(iii) The intensification of development on lots containing isolated nonresidential uses or new development of isolated cottage industries and isolated small-scale businesses that are not principally designed to serve the existing and projected rural population and nonresidential uses, but do provide job opportunities for rural residents. Rural counties may allow the expansion of small-scale businesses as long as those small-scale businesses conform with the rural character of the area as defined by the local government according to \*RCW 36.70A.030(14). Rural counties may also allow new small-scale businesses to utilize a site previously occupied by an existing business as long as the new small-scale business conforms to the rural character of the area as defined by the local government according to \*RCW 36.70A.030(14). Public services and public facilities shall be limited to those necessary to serve the isolated nonresidential use and shall be provided in a manner that does not permit low-density sprawl;

(iv) A county shall adopt measures to minimize and contain the existing areas or uses of more intensive rural development, as appropriate, authorized under this subsection. Lands included in such existing areas or uses shall not extend beyond the logical outer

boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl. Existing areas are those that are clearly identifiable and contained and where there is a logical boundary delineated predominately by the built environment, but that may also include undeveloped lands if limited as provided in this subsection. The county shall establish the logical outer boundary of an area of more intensive rural development. In establishing the logical outer boundary the county shall address (A) the need to preserve the character of existing natural neighborhoods and communities, (B) physical boundaries such as bodies of water, streets and highways, and land forms and contours, (C) the prevention of abnormally irregular boundaries, and (D) the ability to provide public facilities and public services in a manner that does not permit low-density sprawl;

(v) For purposes of (d) of this subsection, an existing area or existing use is one that was in existence:

(A) On July 1, 1990, in a county that was initially required to plan under all of the provisions of this chapter;

(B) On the date the county adopted a resolution under RCW 36.70A.040(2), in a county that is planning under all of the provisions of this chapter under RCW 36.70A.040(2); or

(C) On the date the office of financial management certifies the county's population as provided in RCW 36.70A.040(5), in a county that is planning under all of the provisions of this chapter pursuant to RCW 36.70A.040(5).

(e) Exception. This subsection shall not be interpreted to permit in the rural area a major industrial development or a master planned resort unless otherwise specifically permitted under RCW 36.70A.360 and 36.70A.365.

(6) A transportation element that implements, and is consistent with, the land use element.

(a) The transportation element shall include the following subelements:

(i) Land use assumptions used in estimating travel;

(ii) Estimated traffic impacts to state-owned transportation facilities resulting from land use assumptions to assist the department of transportation in monitoring the performance of state facilities, to plan improvements for the facilities, and to assess the impact of land-use decisions on state-owned transportation facilities;

(iii) Facilities and services needs, including:

(A) An inventory of air, water, and ground transportation facilities and services, including transit alignments and general aviation airport facilities, to define existing capital facilities and travel levels as a basis for future planning. This inventory must include state-owned transportation facilities within the city or county's jurisdictional boundaries;

(B) Level of service standards for all locally owned arterials and transit routes to serve as a gauge to judge performance of the system. These standards should be regionally coordinated;

(C) For state-owned transportation facilities, level of service standards for highways, as prescribed in chapters 47.06 and 47.80 RCW, to gauge the performance of the system. The purposes of reflecting level of service standards for state highways in the local comprehensive plan are to monitor the performance of the system, to evaluate improvement strategies, and to facilitate coordination between the county's or city's six-year street, road, or transit program and the department of transportation's six-year investment program. The concurrency requirements of (b) of this subsection do not apply to transportation facilities and services of statewide significance except for counties consisting of islands whose only connection to the mainland are state highways or ferry routes. In these island counties, state highways and ferry route capacity must be a factor in meeting the concurrency requirements in (b) of this subsection;

(D) Specific actions and requirements for bringing into compliance locally owned transportation facilities or services that are below an established level of service standard;

(E) Forecasts of traffic for at least ten years based on the adopted land use plan to provide information on the location, timing, and capacity needs of future growth;

(F) Identification of state and local system needs to meet current and future demands. Identified needs on state-owned transportation facilities must be consistent with the statewide multimodal transportation plan required under chapter 47.06 RCW;

(iv) Finance, including:

(A) An analysis of funding capability to judge needs against probable funding resources;

(B) A multiyear financing plan based on the needs identified in the comprehensive plan, the appropriate parts of which shall serve as the basis for the six-year street, road, or transit program required by RCW 35.77.010 for cities, RCW 36.81.121 for counties, and RCW 35.58.2795 for public transportation systems. The multiyear financing plan should be coordinated with the six-year improvement program developed by the department of transportation as required by \*\*RCW 47.05.030;

(C) If probable funding falls short of meeting identified needs, a discussion of how additional funding will be raised, or how land use assumptions will be reassessed to ensure that level of service standards will be met;

(v) Intergovernmental coordination efforts, including an assessment of the impacts of the transportation plan and land use assumptions on the transportation systems of adjacent jurisdictions;

(vi) Demand-management strategies;

(vii) Pedestrian and bicycle component to include collaborative efforts to identify and designate planned improvements for pedestrian and bicycle facilities and corridors that address and encourage enhanced community access and promote healthy lifestyles.

(b) After adoption of the comprehensive plan by jurisdictions required to plan or who choose to plan under RCW 36.70A.040, local jurisdictions must adopt and enforce

ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development. These strategies may include increased public transportation service, ride sharing programs, demand management, and other transportation systems management strategies. For the purposes of this subsection (6) "concurrent with the development" shall mean that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years.

(c) The transportation element described in this subsection (6), and the six-year plans required by RCW 35.77.010 for cities, RCW 36.81.121 for counties, RCW 35.58.2795 for public transportation systems, and \*\*RCW 47.05.030 for the state, must be consistent.

(7) An economic development element establishing local goals, policies, objectives, and provisions for economic growth and vitality and a high quality of life. The element shall include: (a) A summary of the local economy such as population, employment, payroll, sectors, businesses, sales, and other information as appropriate; (b) a summary of the strengths and weaknesses of the local economy defined as the commercial and industrial sectors and supporting factors such as land use, transportation, utilities, education, work force, housing, and natural/cultural resources; and (c) an identification of policies, programs, and projects to foster economic growth and development and to address future needs. A city that has chosen to be a residential community is exempt from the economic development element requirement of this subsection.

(8) A park and recreation element that implements, and is consistent with, the capital facilities plan element as it relates to park and

recreation facilities. The element shall include: (a) Estimates of park and recreation demand for at least a ten-year period; (b) an evaluation of facilities and service needs; and (c) an evaluation of intergovernmental coordination opportunities to provide regional approaches for meeting park and recreational demand.

(9) It is the intent that new or amended elements required after January 1, 2002, be adopted concurrent with the scheduled update provided in RCW 36.70A.130. Requirements to incorporate any such new or amended elements shall be null and void until funds sufficient to cover applicable local government costs are appropriated and distributed by the state at least two years before local government must update comprehensive plans as required in RCW 36.70A.130.

[2005 c 360 § 2; (2005 c 477 § 1 expired August 31, 2005); 2004 c 196 § 1; 2003 c 152 § 1. Prior: 2002 c 212 § 2; 2002 c 154 § 2; 1998 c 171 § 2; 1997 c 429 § 7; 1996 c 239 § 1; prior: 1995 c 400 § 3; 1995 c 377 § 1; 1990 1st ex.s. c 17 § 7.]

**Notes:**

**Reviser's note:** \*(1) RCW 36.70A.030 was amended by 2005 c 423 § 2, changing subsection (14) to subsection (15).

\*\* (2) RCW 47.05.030 was amended by 2005 c 319 § 9, changing the six-year improvement program to a ten-year improvement program.

**Expiration date—2005 c 477 § 1:** "Section 1 of this act expires August 31, 2005." [2005 c 477 § 3.]

**Effective date—2005 c 477:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 13, 2005]." [2005 c 477 § 2.]

**Findings—Intent—2005 c 360:** "The legislature finds that regular physical activity is essential to maintaining good health and reducing the rates of chronic disease. The legislature further finds that providing opportunities for walking, biking, horseback riding, and other regular forms of exercise is best accomplished through collaboration between the private sector and local, state, and institutional policymakers. This collaboration can build communities where people find it easy and safe to be physically active. It is the intent of the legislature to promote policy and planning efforts

that increase access to inexpensive or free opportunities for regular exercise in all communities around the state." [2005 c 360 § 1.]

**Prospective application—1997 c 429 §§ 1-21:** See note following RCW 36.70A.3201.

**Severability—1997 c 429:** See note following RCW 36.70A.3201.

**Construction—Application—1995 c 400:** "A comprehensive plan adopted or amended before May 16, 1995, shall be considered to be in compliance with RCW 36.70A.070 or 36.70A.110, as in effect before their amendment by this act, if the comprehensive plan is in compliance with RCW 36.70A.070 and 36.70A.110 as amended by this act. This section shall not be construed to alter the relationship between a county-wide planning policy and comprehensive plans as specified under RCW 36.70A.210.

As to any appeal relating to compliance with RCW 36.70A.070 or 36.70A.110 pending before a growth management hearings board on May 16, 1995, the board may take up to an additional ninety days to resolve such appeal. By mutual agreement of all parties to the appeal, this additional ninety-day period may be extended." [1995 c 400 § 4.]

**Effective date—1995 c 400:** See note following RCW 36.70A.040.

### **36.70A.110 Comprehensive plans—Urban growth areas.**

(1) Each county that is required or chooses to plan under RCW 36.70A.040 shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. Each city that is located in such a county shall be included within an urban growth area. An urban growth area may include more than a single city. An urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth whether or not the urban growth area includes a city, or is adjacent to territory already characterized by urban growth, or is a designated new fully contained community as defined by RCW 36.70A.350.

(2) Based upon the growth management population projection made for the county by the office of financial management, the county

and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period, except for those urban growth areas contained totally within a national historical reserve.

Each urban growth area shall permit urban densities and shall include greenbelt and open space areas. In the case of urban growth areas contained totally within a national historical reserve, the city may restrict densities, intensities, and forms of urban growth as determined to be necessary and appropriate to protect the physical, cultural, or historic integrity of the reserve. An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth.

Within one year of July 1, 1990, each county that as of June 1, 1991, was required or chose to plan under RCW 36.70A.040, shall begin consulting with each city located within its boundaries and each city shall propose the location of an urban growth area. Within sixty days of the date the county legislative authority of a county adopts its resolution of intention or of certification by the office of financial management, all other counties that are required or choose to plan under RCW 36.70A.040 shall begin this consultation with each city located within its boundaries. The county shall attempt to reach agreement with each city on the location of an urban growth area within which the city is located. If such an agreement is not reached with each city located within the urban growth area, the county shall justify in writing why it so designated the area an urban growth area. A city may object formally with the department over the designation of the urban growth area within which it is located. Where appropriate, the department shall attempt to resolve the

conflicts, including the use of mediation services.

(3) Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth areas. Urban growth may also be located in designated new fully contained communities as defined by RCW 36.70A.350:

(4) In general, cities are the units of local government most appropriate to provide urban governmental services. In general, it is not appropriate that urban governmental services be extended to or expanded in rural areas except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment and when such services are financially supportable at rural densities and do not permit urban development.

(5) On or before October 1, 1993, each county that was initially required to plan under RCW 36.70A.040(1) shall adopt development regulations designating interim urban growth areas under this chapter. Within three years and three months of the date the county legislative authority of a county adopts its resolution of intention or of certification by the office of financial management, all other counties that are required or choose to plan under RCW 36.70A.040 shall adopt development regulations designating interim urban growth areas under this chapter. Adoption of the interim urban growth areas may only occur after public notice; public hearing; and compliance with the state environmental policy act, chapter 43.21C RCW, and RCW 36.70A.110. Such action may be appealed to the appropriate growth management hearings board under RCW 36.70A.280. Final urban growth areas shall be

adopted at the time of comprehensive plan adoption under this chapter.

(6) Each county shall include designations of urban growth areas in its comprehensive plan.

(7) An urban growth area designated in accordance with this section may include within its boundaries urban service areas or potential annexation areas designated for specific cities or towns within the county.

[2004 c 206 § 1; 2003 c 299 § 5; 1997 c 429 § 24; 1995 c 400 § 2; 1994 c 249 § 27; 1993 sp.s. c 6 § 2; 1991 sp.s. c 32 § 29; 1990 1st ex.s. c 17 § 11.]

**Notes:**

**Severability—1997 c 429:** See note following RCW 36.70A.3201.

**Construction—Application—1995 c 400:** See note following RCW 36.70A.070.

**Effective date—1995 c 400:** See note following RCW 36.70A.040.

**Severability—Application—1994 c 249:** See notes following RCW 34.05.310.

**Effective date—1993 sp.s. c 6:** See note following RCW 36.70A.040.

### **36.70A.170 Natural resource lands and critical areas—Designations.**

(1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:

(a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products;

(b) Forest lands that are not already characterized by urban growth and that have long-term significance for the commercial production of timber;

(c) Mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals; and

(d) Critical areas.

(2) In making the designations required by this section, counties and cities shall consider

the guidelines established pursuant to RCW 36.70A.050.

[1990 1st ex.s. c 17 § 17.]

### **36.70A.270 Growth management hearings boards—Conduct, procedure, and compensation.**

Each growth management hearings board shall be governed by the following rules on conduct and procedure:

(1) Any board member may be removed for inefficiency, malfeasance, and misfeasance in office, under specific written charges filed by the governor. The governor shall transmit such written charges to the member accused and the chief justice of the supreme court. The chief justice shall thereupon designate a tribunal composed of three judges of the superior court to hear and adjudicate the charges. Removal of any member of a board by the tribunal shall disqualify such member for reappointment.

(2) Each board member shall receive reimbursement for travel expenses incurred in the discharge of his or her duties in accordance with RCW 43.03.050 and 43.03.060. If it is determined that the review boards shall operate on a full-time basis, each member shall receive an annual salary to be determined by the governor pursuant to RCW 43.03.040. If it is determined that a review board shall operate on a part-time basis, each member shall receive compensation pursuant to RCW 43.03.250, provided such amount shall not exceed the amount that would be set if they were a full-time board member. The principal office of each board shall be located by the governor within the jurisdictional boundaries of each board. The boards shall operate on either a part-time or full-time basis, as determined by the governor.

(3) Each board member shall not: (a) Be a candidate for or hold any other public office or trust; (b) engage in any occupation or business interfering with or inconsistent with his or her duty as a board member; and (c) for a period of one year after the termination of his or her board membership, act in a representative capacity before the board on any matter.

(4) A majority of each board shall constitute a quorum for making orders or decisions, adopting rules necessary for the conduct of its powers and duties, or transacting other official business, and may act even though one position of the board is vacant. One or more members may hold hearings and take testimony to be reported for action by the board when authorized by rule or order of the board. The board shall perform all the powers and duties specified in this chapter or as otherwise provided by law.

(5) The board may appoint one or more hearing examiners to assist the board in its hearing function, to make conclusions of law and findings of fact and, if requested by the board, to make recommendations to the board for decisions in cases before the board. Such hearing examiners must have demonstrated knowledge of land use planning and law. The boards shall specify in their joint rules of practice and procedure, as required by subsection (7) of this section, the procedure and criteria to be employed for designating hearing examiners as a presiding officer. Hearing examiners selected by a board shall meet the requirements of subsection (3) of this section. The findings and conclusions of the hearing examiner shall not become final until they have been formally approved by the board. This authorization to use hearing examiners does not waive the requirement of RCW 36.70A.300 that final orders be issued within one hundred eighty days of board receipt of a petition.

(6) Each board shall make findings of fact and prepare a written decision in each case decided by it, and such findings and decision shall be effective upon being signed by two or more members of the board and upon being filed at the board's principal office, and shall be open for public inspection at all reasonable times.

(7) All proceedings before the board, any of its members, or a hearing examiner appointed by the board shall be conducted in accordance with such administrative rules of practice and procedure as the boards jointly prescribe. All three boards shall jointly meet to develop and

adopt joint rules of practice and procedure, including rules regarding expeditious and summary disposition of appeals. The boards shall publish such rules and decisions they render and arrange for the reasonable distribution of the rules and decisions. Except as it conflicts with specific provisions of this chapter, the administrative procedure act, chapter 34.05 RCW, and specifically including the provisions of RCW 34.05.455 governing ex parte communications, shall govern the practice and procedure of the boards.

(8) A board member or hearing examiner is subject to disqualification under chapter 34.05 RCW. The joint rules of practice of the boards shall establish procedures by which a party to a hearing conducted before the board may file with the board a motion to disqualify, with supporting affidavit, against a board member or hearing examiner assigned to preside at the hearing.

(9) The members of the boards shall meet jointly on at least an annual basis with the objective of sharing information that promotes the goals and purposes of this chapter.

[1997 c 429 § 11; 1996 c 325 § 1; 1994 c 257 § 1; 1991 sp.s. c 32 § 7.]

**Notes:**

**Prospective application—1997 c 429 §§ 1-21:** See note following RCW 36.70A.3201.

**Severability—1997 c 429:** See note following RCW 36.70A.3201.

**Severability—1996 c 325:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1996 c 325 § 6.]

**Effective date—1996 c 325:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [March 30, 1996]." [1996 c 325 § 7.]

**Severability—1994 c 257:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1994 c 257 § 26.]

**36.70A.290 Petitions to growth management hearings boards—Evidence.**

(1) All requests for review to a growth management hearings board shall be initiated by filing a petition that includes a detailed statement of issues presented for resolution by the board. The board shall render written decisions articulating the basis for its holdings. The board shall not issue advisory opinions on issues not presented to the board in the statement of issues, as modified by any prehearing order.

(2) All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within sixty days after publication by the legislative bodies of the county or city.

(a) Except as provided in (c) of this subsection, the date of publication for a city shall be the date the city publishes the ordinance, or summary of the ordinance, adopting the comprehensive plan or development regulations, or amendment thereto, as is required to be published.

(b) Promptly after adoption, a county shall publish a notice that it has adopted the comprehensive plan or development regulations, or amendment thereto.

Except as provided in (c) of this subsection, for purposes of this section the date of publication for a county shall be the date the county publishes the notice that it has adopted the comprehensive plan or development regulations, or amendment thereto.

(c) For local governments planning under RCW 36.70A.040, promptly after approval or disapproval of a local government's shoreline master program or amendment thereto by the department of ecology as provided in RCW 90.58.090, the local government shall publish a notice that the shoreline master program or amendment thereto has been approved or disapproved by the department of ecology. For purposes of this section, the date of publication

for the adoption or amendment of a shoreline master program is the date the local government publishes notice that the shoreline master program or amendment thereto has been approved or disapproved by the department of ecology.

(3) Unless the board dismisses the petition as frivolous or finds that the person filing the petition lacks standing, or the parties have filed an agreement to have the case heard in superior court as provided in RCW 36.70A.295, the board shall, within ten days of receipt of the petition, set a time for hearing the matter.

(4) The board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.

(5) The board, shall consolidate, when appropriate, all petitions involving the review of the same comprehensive plan or the same development regulation or regulations.

[1997 c 429 § 12; 1995 c 347 § 109. Prior: 1994 c 257 § 2; 1994 c 249 § 26; 1991 sp.s. c 32 § 10.]

**Notes:**

**Prospective application—1997 c 429 §§ 1-21:** See note following RCW 36.70A.3201.

**Severability—1997 c 429:** See note following RCW 36.70A.3201.

**Finding—Severability—Part headings and table of contents not law—1995 c 347:** See notes following RCW 36.70A.470.

**Severability—1994 c 257:** See note following RCW 36.70A.270.

**Severability—Application—1994 c 249:** See notes following RCW 34.05.310.

**36.70A.300 Final orders.**

(1) The board shall issue a final order that shall be based exclusively on whether or not a state agency, county, or city is in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and

amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW.

(2)(a) Except as provided in (b) of this subsection, the final order shall be issued within one hundred eighty days of receipt of the petition for review, or, if multiple petitions are filed, within one hundred eighty days of receipt of the last petition that is consolidated.

(b) The board may extend the period of time for issuing a decision to enable the parties to settle the dispute if additional time is necessary to achieve a settlement, and (i) an extension is requested by all parties, or (ii) an extension is requested by the petitioner and respondent and the board determines that a negotiated settlement between the remaining parties could resolve significant issues in dispute. The request must be filed with the board not later than seven days before the date scheduled for the hearing on the merits of the petition. The board may authorize one or more extensions for up to ninety days each, subject to the requirements of this section.

(3) In the final order, the board shall either:

(a) Find that the state agency, county, or city is in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW; or

(b) Find that the state agency, county, or city is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW, in which case the board shall remand the matter to the affected state agency, county, or city. The board shall specify a reasonable time not in excess of one hundred eighty days, or such longer period as determined by the board in cases of unusual scope or complexity, within which the state agency, county, or city shall comply with the requirements of this chapter. The board may require periodic reports to the

board on the progress the jurisdiction is making towards compliance.

(4) Unless the board makes a determination of invalidity as provided in RCW 36.70A.302, a finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations during the period of remand.

(5) Any party aggrieved by a final decision of the hearings board may appeal the decision to superior court as provided in RCW 34.05.514 or 36.01.050 within thirty days of the final order of the board.

[1997 c 429 § 14; 1995 c 347 § 110; 1991 sp.s. c 32 § 11.]

**Notes:**

**Prospective application—1997 c 429 §§ 1-21:** See note following RCW 36.70A.3201.

**Severability—1997 c 429:** See note following RCW 36.70A.3201.

**Finding—Severability—Part headings and table of contents not law—1995 c 347:** See notes following RCW 36.70A.470.

**36.70A.302 Determination of invalidity—Vesting of development permits—Interim controls.**

(1) A board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:

(a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;

(b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and

(c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

(2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law

before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

(3)(a) Except as otherwise provided in subsection (2) of this section and (b) of this subsection, a development permit application not vested under state or local law before receipt of the board's order by the county or city vests to the local ordinance or resolution that is determined by the board not to substantially interfere with the fulfillment of the goals of this chapter.

(b) Even though the application is not vested under state or local law before receipt by the county or city of the board's order, a determination of invalidity does not apply to a development permit application for:

(i) A permit for construction by any owner, lessee, or contract purchaser of a single-family residence for his or her own use or for the use of his or her family on a lot existing before receipt by the county or city of the board's order, except as otherwise specifically provided in the board's order to protect the public health and safety;

(ii) A building permit and related construction permits for remodeling, tenant improvements, or expansion of an existing structure on a lot existing before receipt of the board's order by the county or city; and

(iii) A boundary line adjustment or a division of land that does not increase the number of buildable lots existing before receipt of the board's order by the county or city.

(4) If the ordinance that adopts a plan or development regulation under this chapter includes a savings clause intended to revive prior policies or regulations in the event the new plan or regulations are determined to be invalid, the board shall determine under subsection (1) of this section whether the prior policies or regulations are valid during the period of remand.

(5) A county or city subject to a determination of invalidity may adopt interim controls and other measures to be in effect until it adopts a comprehensive plan and development regulations that comply with the requirements of this chapter. A development permit application may vest under an interim control or measure upon determination by the board that the interim controls and other measures do not substantially interfere with the fulfillment of the goals of this chapter.

(6) A county or city subject to a determination of invalidity may file a motion requesting that the board clarify, modify, or rescind the order. The board shall expeditiously schedule a hearing on the motion. At the hearing on the motion, the parties may present information to the board to clarify the part or parts of the comprehensive plan or development regulations to which the final order applies. The board shall issue any supplemental order based on the information provided at the hearing not later than thirty days after the date of the hearing.

(7)(a) If a determination of invalidity has been made and the county or city has enacted an ordinance or resolution amending the invalidated part or parts of the plan or regulation or establishing interim controls on development affected by the order of invalidity, after a compliance hearing, the board shall modify or rescind the determination of invalidity if it determines under the standard in subsection (1) of this section that the plan or regulation, as amended or made subject to such interim controls, will no longer substantially interfere with the fulfillment of the goals of this chapter.

(b) If the board determines that part or parts of the plan or regulation are no longer invalid as provided in this subsection, but does not find that the plan or regulation is in compliance with all of the requirements of this chapter, the board, in its order, may require periodic reports to the board on the progress the jurisdiction is making towards compliance.

[1997 c 429 § 16.]

Notes:

**Prospective application—1997 c 429 §§ 1-21:** See note following RCW 36.70A.3201.

**Severability—1997 c 429:** See note following RCW 36.70A.3201.

### **36.70A.320 Presumption of validity—Burden of proof—Plans and regulations.**

(1) Except as provided in subsection (5) of this section, comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

(2) Except as otherwise provided in subsection (4) of this section, the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter.

(3) In any petition under this chapter, the board, after full consideration of the petition, shall determine whether there is compliance with the requirements of this chapter. In making its determination, the board shall consider the criteria adopted by the department under RCW 36.70A.190(4). The board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter.

(4) A county or city subject to a determination of invalidity made under RCW 36.70A.300 or 36.70A.302 has the burden of demonstrating that the ordinance or resolution it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter under the standard in RCW 36.70A.302(1).

(5) The shoreline element of a comprehensive plan and the applicable development regulations adopted by a county or city shall take effect as provided in chapter 90.58 RCW.

[1997 c 429 § 20; 1995 c 347 § 111; 1991 sp.s. c 32 § 13.]

**Notes:**

**Prospective application—1997 c 429 §§ 1-21:** See note following RCW 36.70A.3201.

**Severability—1997 c 429:** See note following RCW 36.70A.3201.

**Finding—Severability—Part headings and table of contents not law—1995 c 347:** See notes following RCW 36.70A.470.

### **36.70A.3201 Intent—Finding—1997 c 429 § 20(3).**

In amending RCW 36.70A.320(3) by section 20(3), chapter 429, Laws of 1997, the legislature intends that the boards apply a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

[1997 c 429 § 2.]

**Notes:**

**Prospective application—1997 c 429 §§ 1-21:** "Except as otherwise specifically provided in RCW 36.70A.335, sections 1 through 21, chapter 429, Laws of 1997 are prospective in effect and shall not affect the validity of actions taken or decisions made before July 27, 1997." [1997 c 429 § 53.]

**Severability—1997 c 429:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1997 c 429 § 54.]